(29,642)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 339

SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF DURHAM, NORTH CAROLINA

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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[fol. 1] **IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922**

No. —

SOUTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, and SEABOARD AIR LINE RAILWAY COMPANY, Appellants,

vs.

CITY OF DURHAM, Appellee

PETITION FOR WRIT OF ERROR—Filed Apr. 25, 1923

To the Honorable the Chief Justice of the North Carolina Supreme Court:

Your petitioners, Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, respectfully represent:

That this proceeding was instituted in the Superior Court of Durham County, North Carolina by the City of Durham for a mandamus to enforce an ordinance requiring the three railroad companies to eliminate the grade crossing of Chapel Hill Street over the tracks of the railways in the City of Durham, North Carolina, by constructing an under-pass, below the tracks, for the highway. The three defendants, petitioners here, are steam railroad systems engaged in interstate commerce. The tracks crossing Chapel Hill Street are part of their interstate railroad systems. The Norfolk and Western Railway Company filed an answer making the defense that an overhead bridge would be the appropriate remedy and that "before the ordinance was passed" that Company submitted plans and detailed specifications and "made proposal of a plan for an overhead structure which would have carried the highway over the tracks of the three railways". The Southern and Seaboard in their answers also set up that an overhead bridge would be an equally effectual solution of [fol. 2] the problem of grade separation with the proposed under-pass and would not be wasteful and uneconomic. The first cost of the overhead structure would be, as disclosed by the answer, $160,000.00 as contrasted with $258,800.00 for the under-pass. Circumstances of fact are also detailed in the answers showing the other advantages of convenience and safety which the overhead structure would have had as contrasted with the under-pass required by the ordinance.

In addition to other defenses the answers raise by express averment these three Federal defenses:

I. The ordinance in requiring the construction of an under-pass is arbitrary and unreasonable and not due process of law required by the Fourteenth Amendment of the Constitution of the United States:

II. The ordinance is an unreasonable imposition and restraint upon interstate commerce inhibited by Article I, Section 8, Paragraph 3, of the Constitution of the United States:

III. The ordinance in requiring an under-pass is void for that compliance therewith will not be efficient and economical management and reasonable expenditure for structures required by subdivision 2, Section 15a of the Act of Congress known as the Act to Regulate Commerce, which section was added to that Act by one of the amendments of the Transportation Act of 28 February, 1920.

The Superior Court held as matter of law that the answers raised no issues of fact and if true, did not state defenses. A trial to a jury on the issues of fact was denied: the Superior Court having made the finding of "facts from the pleadings" though the facts showing the existence of the three Federal defenses were uncontradicted, the Superior Court had the view that those facts, if proven, would not constitute a defense. A writ of alternative mandamus was awarded and on appeal the judgment awarding the writ was affirmed April [fol. 3] 4, 1923, by the North Carolina Supreme Court on the grounds that "no issues of fact are raised by the answer"; that "the reasonableness of a city ordinance is a question of law for the court"; and that sufficient facts were not "alleged to show that the ordinance is unreasonable and oppressive".

That these petitioners are aggrieved by the said final judgment entered against them by the North Carolina Supreme Court in the above-described case wherein your petitioners were appellants and the City of Durham, North Carolina, was appellee:

That the judgment aforesaid of the North Carolina Supreme Court is the judgment of the highest Court in said State in which said cause could be heard and determined, and the record of said judgment and of the proceedings in said cause is still in the said North Carolina Supreme Court:

That the said final judgment of the North Carolina Supreme Court was entered in a cause wherein was drawn in question the validity of an ordinance of the City of Durham in said State dated 20, March, 1922, and of a judgment and order of the Superior Court of Durham County, North Carolina, awarding mandamus to enforce said ordinance, the validity being drawn in question, on the grounds that the said ordinance and the judgment enforcing the same were repugnant to Article I, Section 8, Paragraph 3, of the Constitution of the United States, being the Commerce Clause: to sub-division 2 of Section 15a of the Act of Congress known as the Act to Regulate Commerce as amended by the Transportation Act of 28 February, 1920: and to the Fourteenth Amendment of the Constitution of the United States: and the decision was in favor of the validity of the State Statute and authority so drawn in question and said judgment is against the constitutional rights claimed by these petitioners and is contrary to the Constitution of the United States: and is also against the validity of a right claimed by the [fol. 4] petitioners under a Federal Statute: all of which will more

fully appear in detail from the assignment of errors presented herewith and filed herein.

Wherefore your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of North Carolina to the end that the record in said matter may be removed into the Supreme Court of the United States and the errors complained of by your petitioners may be examined and corrected and said judgment reversed. And your petitioners will every pray.

Southern Railway Company, By Manly, Hendren & Womble, L. E. Jeffries, Attorneys. Norfolk and Western Railway Company, By W. B. Guthrie, Theodore W. Reath, Attorneys. Seaboard Air Line Railway Company, By James F. Wright, Fuller & Fuller, Attorneys. April 19, 1923.

Approved: Walter Clark, C. J.

[File endorsement omitted.]

[fol. 5] WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Chief Justice of the North Carolina Supreme Court, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said North Carolina Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, and the City of Durham, in which the Railways were appellants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws [fols. 6 & 7] of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-

cerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 25th day of April, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal of the United States District Court, Eastern Division.]

S. A. Ashe, Clerk of the District Court of the United States.

Allowed by Walter Clark, Chief Justice of the North Carolina Supreme Court.

[fol. 8] [File endorsement omitted.]

CITATION AND SERVICE—Filed Apr. 25, 1923

UNITED STATES OF AMERICA, ss:

To the City of Durham, North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of North Carolina, wherein Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter Clark, Chief Associate Justice of the North Carolina Supreme Court, this the 25th day of April, in the year of our Lord one thousand nine hundred and twenty-three.

Walter Clark, Chief Justice of North Carolina Supreme Court.

Service accepted and receipt of copy acknowledged.

S. C. Chambers, Atty. for City of Durham. This April 27, 1923.

[fol. 9] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922

No. —

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the said Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, Appellants, and respectfully submit that in the record, proceedings, decision and final judgment of the North Carolina Supreme Court in the above entitled matter there is manifest error in this to-wit:

First. The North Carolina Supreme Court erred in affirming the judgment of the Superior Court of Durham County, North Carolina, entered September 16, 1922, which had upheld the ordinance of the City of Durham of the 20th of March, 1922, granting mandamus to compel these Petitioners to construct and maintain an under-pass across their tracks at Chapel Hill Street crossing in the City of Durham, North Carolina.

Second. The North Carolina Supreme Court erred in holding by its judgment of April 4, 1923, as a matter of law and without evidence, that the facts set up in the answers of the three Petitioners did not constitute a defense by the averments that the under-pass required by the ordinance was an unreasonable requirement so [fol. 10] oppressive and arbitrary as to deprive defendants of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Third. The North Carolina Supreme Court erred in holding that the said ordinance of the City of Durham upheld by the judgment of the Superior Court was not, under the facts set up in the answers of petitioners, arbitrary and unreasonable as a restraint upon interstate commerce inhibited by Article I, Section 8, Paragraph 3, of the Constitution of the United States.

Fourth. The North Carolina Supreme Court erred in holding by its judgment of April 4, 1923, as a matter of law and without evidence, that the following facts set up in the answers of the three petitioners, viz., that proposal was made to afford the relief by the construction of an overhead structure at a cost of approximately one hundred thousand dollars less than the cost of the under-pass required by the ordinance and that the overhead structure would cause the minimum property damage and eliminate serious drainage difficulties and would provide a safer highway than the viaduct directed to be constructed by the said ordinance,—did not constitute a defense to the requirement of an under-pass by the ordinance of the City of Durham, in that compliance with said ordinance was

unreasonable and not efficient, economical management and not such a reasonable expenditure as required by Section 15(a), subdivision 2 of the Act of Congress known as the Act to Regulate Commerce, as amended by the Transportation Act of February 28, 1920.

Fifth. The Supreme Court of North Carolina erred in holding that no "issue of fact" was raised by the averments in the answer of petitioners that the action of the City of Durham in passing the [fol. 11] ordinance was arbitrary, unreasonable, and oppressive, in that a bridge offered to be constructed affording relief from the danger could be constructed for the sum of one thousand dollars less than the under-pass and that said proposed overhead bridge would be safer, avoid drainage difficulties, and do less property damage; and by this holding the Supreme Court of North Carolina deprived defendants of the defense plead that said ordinance was so arbitrary, unreasonable, and oppressive as to deprive it of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Sixth. The North Carolina Supreme Court erred in declining to hold, as contended for by the petitioners, that the ordinance is void for that compliance with the same would not be that efficient and economical management and reasonable expenditure for structure by the carriers as required by sub-division 2, Section 15(a), of the Interstate Commerce Act, as amended by the Transportation Act, and holding that nothing in the Transportation Act contravened the right of the State to legislate in the interest of public safety under the facts shown in the pleadings herein and in the manner set forth in the said ordinance of the City of Durham.

Seventh. The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that an overhead bridge would have been reasonable and that the said under-pass was unreasonable in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, Paragraph 3.

[fol. 12] Eighth. The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that the under-pass was inefficient and uneconomic management and an unreasonable expenditure for structures in violation of Section 15 (a), sub-division 2, of the Act of Congress known as the Act to Regulate Commerce.

Ninth. The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reason-

able; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that the under-pass was arbitrary and unreasonable and not due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Southern Railway Company, By Manly, Hendren & Womble. L. E. Jeffries, Attorneys. Norfolk and Western Railway Company, By W. B. Guthrie, Theodore W. Reath, Attorneys. Seaboard Air Line Railway Company, By James F. Wright, Fuller & Fuller, Attorneys. April 19, 1923.

[fols. 13-15] BOND ON WRIT OF ERROR [Amount $1,000.00; approved, Clark, C. J.; omitted in printing]

[fol. 16] TRANSCRIPT OF APPEAL TO SUPREME COURT OF NORTH CAROLINA

Tenth District

No. —

CITY OF DURHAM

v.

SOURTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY

Before Connor, J., Defendants Appealed

Be it remembered, that on the 16th day of August, 1922, the City of Durham, sued and prosecuted out of the Superior Court of Durham County a summons in these words:

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

SUMMONS AND RETURN

The State of North Carolina to the Sheriff of Durham County, Greeting:

You are hereby commanded to summons Southern Railway Company; Norfolk & Western Railway Company and Seaboard Air Line Railway Company, the defendants above named, if they be

found within your county, to appear before Hon. George W. Connor, Judge of the Superior Court, at Chambers, at Hillsboro, N. C., on the 31st, day of August, 1922 at 11 o'clock A. M., an answer the complaint which has been deposited in the office of the Clerk of the Superior Court of said county, and for such other and further proceedings as may be had in the above entitled action. And let de-
[fol. 17] fendants take notice, that if they fail to answer said Complaint within the time prescribed by law, or fail to appear, the Plaintiff will apply to the Court for the relief demanded in the Complaint.

Herein fail not, and of this summons make due return.

Given under my hand, this 16 day of August, 1922.

W. H. Young, Clerk Superior Court, Durham County.

And on the return day of said summons, to-wit, on the 31st day of August, 1922, at the Court House in Durham, before the Honorable W. H. Young, Clerk Superior Court of said County, John F. Harward, Sheriff of said County, made the following return on said summons:

Received. August 16, 1922. Served August 16, 1922 by leaving a copy of the within summons and Complaint with W. A. Gattis Agent of the Southern Railway Company, at Durham, N. C. W. H. Pritchard, Agent of the Norfolk and Western Railway Company, at Durham, N. C.

R. L. Montgomery, Agent of the Seaboard Air Line Railway Company, at Durham, N. C.

Jno. F. Harvard, Sheriff, Durham Co.

And thereupon the said the City of Durham, by its attorneys, S. C. Chambers, W. J. Brogden and J. S. Manning, came and complained as follows:

North Carolina,
Durham County:

In the Superior Court

(Title of Cause)

Complaint

The plaintiff for a complaint herein alleges:

1. That it is a municipal corporation, duly created, organized and existing under and by virtue of the laws of the State of North Carolina; that among other powers contained in its charter, delegated to
[fol. 18] its governing authority, to-wit: its City Council, and expressly conferred upon and possessed by plaintiff, as will appear by reference to Section 10 of its charter, is the following:

"The City Council shall have full power and authority, except as otherwise provided for in this act to exercise all of the powers confer-

red upon and delegated to the City of Durham by this charter and the laws of North Carolina. The City Council shall have power to make such ordinances as it may deem necessary for the proper government of the City and to promote and safeguard the health, morals and safety and general welfare and convenience of the public. The City Council may provide for the enforcement of such ordinances, in such manner as it may think best, by fine, imprisonment, or otherwise."

2. That Chapel Hill Street is one of the main streets or th-roughfares located in said City, which street runs in an easterly and westerly direction, the western portion of which connects with the Chapel Hill Boulevard of the State High way leading to the Town of Chapel Hill, Orange County. That said street, except for several hundred feet on either side of the right-of-way hereinafter referred to, has recently been permanently paved, and said street is the leading th-roughfare connecting the northern and southern portions of said city, the said street being used and occupied by the Durham Public Service Company with its tracks, over which it operates a line of street railway.

3. That the defendant, the Southern Railway Company is now, and was at the times hereinafter mentioned, a corporation duly created, organized, existing and doing business under and by virtue of law, operating a line of steam railway over its tracks on its right-of-way, two hundred feet in width, through the City of Durham, crossing said Chapel Hill Street at grade, near the center of said city.

That the defendant, Norfolk and Western Railway Company is now, and was at the times hereinafter mentioned, a corporation duly created, organized, existing and doing business under and by virtue [fol. 19] of law, operating a line of steam railway over its tracks, located on a portion of the said right-of-way of its co-defendant, Southern Railway Company, which said tracks cross said Chapel Hill Street at grade at the point hereinbefore mentioned.

The *the* defendant, Seaboard Air Line Railway Company is now, and was at the times hereinafter mentioned, a corporation duly created, organized, existing and doing business under and by virtue of law, operating a line of steam railway over its tracks located on a portion of said right-of-way of its co-defendant Southern Railway Company, which said tracks cross said Chapel Hill Street at grade at the point hereinbefore mentioned.

4. That within a radius of approximately eight hundred yards of said Chapel Hill Street grade crossing are located the freight depots of the defendant, Southern Railway Company, the defendant, Norfolk & Western Railway Company, and the defendants, Seaboard Air Line Railway Company; a large tobacco plant of the Liggett & Myers Tobacco Company, known as the "Duke Plant;" the tobacco factory known as the "Bull Durham Plant;" The Durham Public Service Company's ice and power plant; the Austin-Heaton Flour

Mill; the Marvin Carr Silk Hosiery Mill, all of which depots and industries are served with side or spur tracks connecting with the main line tracks of defendants and over which main tracks and across said grade crossing, at all times of day and night, are constantly moved and switched numerous freight trains, cars and locomotives, for serving said industries and freight depots, all of which said train and car movements are in addition to the many through passenger and freight trains moving over and along the main tracks of defendant's lines, and over said grade crossings.

5. That the records on file in the office of the Clerk of the Superior Court, for Durham County, show that on or about October 4th, 1917 one W. P. Budd, a citizen of Durham, and an officer of the Budd-Piper Roofing Company, while approaching said crossing [fol. 20] in an automobile, was seriously hurt and injured, while jumping from said automobile in an endeavor to avoid collision with a moving train over said grade crossing; that on or about February 11th, 1918, one Dr. S. Rapport, a citizen of Durham, while attempting to drive an automobile over said crossing, collided with a moving train, resulting in great damage to said automobile; that on or about September 22nd, 1920 one J. D. Inscore, a citizen of Durham, while attempting to drive an automobile over said crossing had said automobile demolished by a freight train which had been "kicked" into said automobile. That in the summer of 1917 a horse, the property of one J. Sid Perry, a citizen and merchant of Durham, while said horse, hitched to a wagon, was being driven over said grade crossing was struck by a moving train, the horse being instantly killed and the wagon demolished. That in the summer of 1919 one M. E. Newsom, a former Mayor of the City of Durham, while attempting to drive an automobile over said crossing, collided with a moving train resulting in the said automobile being completely demolished. That on or about December 5th, 1921 one Forrest Pollard, a citizen and resident of Durham, while attempting to drive an automobile over said crossing collided with a moving passenger train, resulting in one of the rear wheels of said automobile being smashed and torn from said motor vehicle.

6. That said governing authority, finding that that continued maintenance of said grade crossing is a great inconvenience to the whole people, seriously interrupts and impedes street traffic and is dangerous to public travel, employed an expert consulting engineer to advise said governing authority if it was practicable and feasible to change or alter said grade crossing, in order that same might be made safe and convenient for the travelling public, and said engineer, after full and careful investigation, recommended to said City Council that said grade crossing could be best made safe by separating the street and railroad grades and by placing the street underneath the railroad tracks by means of an underpass, and in submit- [fol. 21] ting said recommendation and report said engineer presented plans and estimated cost of the construction of said underpass.

That thereafter said City Council invited defendants to have their representatives meet with it and its representatives with a view to

having said defendants remedy said grade crossing by the building of an underpass in place thereof. That many conferences were held by and between the engineers of the several parties and later by and between certain officers of the defendants and said City Council, all of which said conferences terminated unsatisfactorily to plaintiff, said defendants at no time indicating a willingness or readiness to meet the immediate wishes and requets of plaintiff.

7. That thereafter and on the 20th day of March 1922, the City Council, the governing authority of plaintiff, duly adopted an ordinance in words and figures as follows:

"Whereas, The Greensboro and Goldsboro line of the Southern Railway crosses Chapel Hill Street at grade, near the center of the City of Durham, North Carolina, and,

"Whereas, the right-of-way of said railway at that location is two hundred feet wide, the same being occupied by the tracks of the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, certain of which said tracks are sometimes used by equipment of other railway companies, tenants of said Southern Railway Company, which location is a part of the freight and switch yard of two of said railway companies, where the shifting of engines, cars and trains, both freight and passenger, is a constant practice during the hours of day and night, all of which is in addition to the movement of through freight and passenger trains over said tracks, and,

"Whereas, approimately 120 street cars, 260 heavy trucks, 170 delivery wagons, 788 passenger automobiles, 400 horse drawn vehicles with their passengers, drivers and operators together with 3,600 pedestrians, including many school children, use said grade crossing daily between the hours of 7 o'clock A. M., and 7 o'clock P. M., and,

[fol. 22] "Whereas, the City Council finds and so declares that the continued maintenance of said grade crossing is dangerous to life, limb and property, and that the safety, comfort, convenience and welfare of the public requires its elimination, and,

"Whereas, the City Council, after having opened negotiations with the officials of the said railway companies regarding the said grade crossing, did upon the suggestion of said railway officials, refer the matter to a joint body consisting of the City Manager, City Consulting Engineer, and the engineering representatives of the said Railway companies for the purpose of reaching an agreeable solution of the elimination of said grade crossing, and,

"Whereas, the Consulting Engineer of the City recommends the said grade crossing can best be eliminated by the building of an underpass, and has submitted plans covering same, and,

"Whereas, the railway engineers have submitted in addition to plans for an underpass, counter-plans for a bridge, and,

"Whereas, the City Council, after full and careful consideration, finds and so declares that an underpass instead of a bridge will better meet the needs, safety, convenience and welfare of the public, and that the same can be constructed for the same cost or less than the cost of a bridge, and,

"Whereas, the City Manager and Consulting Engineer report that they and the railroad engineers are substantially agreed upon a general plan for an underpass; be it therefore,

"Ordained by the City Council of the City of Durham,

Section 1. That the grade crossing at Chapel Hill Street occupied and used by the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, and oc-asionally by tenant roads of the said Southern Railway Company, is a menace to the public safety, is dangerous to life, limb and property, and the City Council finds and so declares that the safety, comfort and convenience and welfare of the public requires the [fol. 23] elimination of said grade crossing by the construction of an underpass to take the place thereof.

Section 2. That the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, which said railway companies are now occupying and using tracks crossing the said Chapel Hill Street at grade, are hereby ordered and directed to eliminate said grade crossing by constructing an underpass with proper approaches in the place thereof.

Section 3. That the said underpass structure shall have a minimum overhead clearance of thirteen feet; that center supports, if used, must not be more than eighteen inches in thickness, the center line of which must be concentric with the center line of Chapel Hill Street, as established by the City Engineer; that the horizontal clearance between the center supports and the curb on each side shall not be less than twenty feet, that the sidewalks through said underpass shall be not less than six feet wide in the clear; that the abutment walls shall set flush with or back of the build ng lines as established by *by* the City Engineer, that the finished surface of Chapel Hill Street at the ape*r* of the crown shall not be lower than El. 383.5 as referred to the standard bench mark datum of the Engineering Department of the City of Durham; that solid non-leakable floors shall be provided in the super-structures, that the detail plans for said underpass shall be submitted to the City Engineer for his criticism and shall be approved by him before the beginning of construction work.

Section 4. That the active construction work on said underpass shall be started not later than sixty days from the adoption of this ordinance and same shall be completed within 280 working days thereafter.

Section 5. That this ordinance shall take effect from and after the 20th day of March, 1922."

That immediately after the adoption of said ordinance, a copy of same was forwarded to each defendant by the City Clerk of plaintiff.

[fol. 24] 8. That the City Council, the governing authority of plaintiff, caused to be made a record of the street traffic over and

along said street and across said grade crossing, together with the number of times and lengths thereof said crossing was blocked by trains, cars and engines of the defendants, which record is herein referred to as a traffic census, and which census shows the volume of said traffic and the number of times and lengths thereof said crossing was so blocked during the hours of 5 A. M., and 11 P. M., on the 5th, 22nd and 24th days of June and the 8th, 10th, 11th, 12th and 13th days of July, 1922, that copies of said census are herewith attached marked Exhibits 1 to 8 inclusive, and to which reference is made. That from said traffic census it will appear that approximately 214 street cars, 2,629 motor vehicles, also 427 horse drawn vehicles and 4,355 pedestrians, and persons riding bicycles, use said crossing daily, and further that said crossing is blocked approximately 111 times and for two hours or one-ninth of each day during said hours.

9. That more than sixty days have elapsed since the enactment of said ordinance, but said defendants have failed, refused and still refuse to obey the provisions of said ordinance, or comply with the terms thereof.

Wherefore, plaintiff prays that a writ of mandamus be issued and directed to said defendants directing defendants to immediately comply with the provisions of the ordinance hereinbefore set out.

For the costs of this action.

S. C. Chambers, W. J. Brogden, J. S. Manning, Attorneys for Plaintiff.

North Carolina,
Durham County:

J. M. Manning, being duly sworn, says: that he is Mayor of the City of Durham, the plaintiff in the within entitled action, that he has read the complaint and that the same is true of his knowledge [fol. 25] except as to the matters and things therein mentioned on information and belief and as to those he believes it to be true.

Jno. M. Manning.

Sworn to and subscribed before me this 16th day of August 1922. W. J. Holloway, Notary Public. (Notarial Seal.) My commission expires 15th day of January, 1924.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., June 5, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	3	...	...	...	...	7	4	1	3	28	12	...	..	..
6 to 7 A. M.....	7	6	6	6	6	4	53	12	19	10	179	343	1	0	40
7 to 8 A. M.....	6	7	15	8	8	4	50	27	19	20	174	63	5	6	35
8 to 9 A. M.....	6	6	15	6	22	4	70	30	39	15	154	59	1	1	05
9 to 10 A. M.....	6	5	6	9	22	20	53	43	32	28	112	66	12	17	45
10 to 11 A. M....	5	6	5	9	13	12	66	30	23	27	69	119	15	21	30
11 to 12 A. M....	7	7	11	7	19	14	68	46	22	22	102	145	16	17	00
12 to 1 P. M.....	7	6	4	3	10	16	84	76	7	13	155	230	9	14	45
1 to 2 P. M.....	6	6	7	13	16	17	62	61	14	10	135	98	13	24	00
2 to 3 P. M.....	7	5	16	15	13	12	67	54	14	15	87	61	17	24	55
3 to 4 P. M.....	5	6	11	10	5	9	74	58	16	14	110	59	8	9	20
4 to 5 P. M.....	9	8	11	13	6	6	105	42	10	11	439	159	8	7	50
5 to 6 P. M.....	6	6	6	6	11	10	56	62	12	19	75	185	12	15	50
6 to 7 P. M.....	5	6	6	4	6	11	62	96	9	11	92	280	3	2	30
7 to 8 P. M.....	6	6	...	...	5	6	84	68	8	6	167	84	6	10	30
8 to 9 P. M.....	6	6	...	...	1	4	72	54	3	2	103	86	4	4	30
9 to 10 P. M.....	5	5	...	...	...	...	51	31	...	1	39	95	4	8	00
10 to 11 P. M....	5	5	...	...	...	9	27	30	...	...	24	87	11	12	50
Totals	105	105	119	109	163	158	1,111	824	248	227	2,235	2,231	145	..	..
Grand Total.	210		228		321		1,935		475		4,466		145	3 h. 19 m. 35 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., June 22, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	4	1	1	6	2	5	5	4	1	36	16	2	1	20
6 to 7 A. M.....	6	6	6	2	8	2	58	14	18	8	146	492	4	5	50
7 to 8 A. M.....	7	7	5	11	8	7	41	25	21	11	130	32	2	1	30
8 to 9 A. M.....	6	7	5	9	11	7	56	34	22	16	144	41	7	13	20
9 to 10 A. M.....	6	5	11	15	16	16	61	51	22	10	81	52	9	7	20
10 to 11 A. M....	6	7	12	14	20	23	86	81	17	18	59	49	15	9	30
11 to 12 A. M....	6	5	22	17	15	14	110	91	16	15	88	102	16	13	50
12 to 1 P. M.....	6	6	7	8	7	5	134	117	13	12	117	153	8	8	15
1 to 2 P. M.....	5	7	11	17	22	15	134	92	17	8	88	75	5	3	55
2 to 3 P. M.....	8	6	12	12	12	9	68	45	8	8	95	53	9	9	30
3 to 4 P. M.....	6	6	9	8	12	8	80	35	16	7	77	65	1	2	40
4 to 5 P. M.....	7	7	14	7	10	8	60	40	10	14	308	107	7	10	45
5 to 6 P. M.....	6	6	9	3	3	6	72	52	12	11	49	182	9	10	40
6 to 7 P. M.....	6	7	5	5	5	11	57	98	3	8	93	213	3	4	30
7 to 8 P. M.....	6	6	1	...	3	3	107	83	7	6	112	95	2	2	35
8 to 9 P. M.....	6	6	1	...	1	1	83	73	4	4	122	92	2	1	00
9 to 10 P. M.....	6	6	1	...	2	1	80	67	3	1	38	92	2	1	20
10 to 11 P. M....	6	6	...	...	...	1	53	36	1	1	20	116	3	2	30
Totals	106	110	132	129	161	139	1,345	1,039	214	159	1,803	2,027	106	..	..
Grand Total.	216		261		300		2,384		373		3,830		106	1 h. 50 m. 20 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., June 24, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	3	1	...	...	...	7	1	6	4	22	14	...	..	..
6 to 7 A. M.....	6	6	6	4	5	2	48	18	20	10	121	379	2	..	30
7 to 8 A. M.....	6	6	21	13	22	12	97	56	28	11	158	55	5	5	10
8 to 9 A. M.....	7	7	12	5	22	9	127	80	16	17	159	44	4	5	20
9 to 10 A. M.....	6	6	10	9	23	21	80	63	15	13	100	64	4	4	10
10 to 11 A. M....	6	6	6	12	25	19	70	43	14	10	91	81	5	6	10
11 to 12 A. M....	6	7	5	8	20	16	62	40	18	9	175	116	11	15	00
12 to 1 P. M.....	5	5	7	5	20	20	83	90	18	6	283	306	7	8	15
1 to 2 P. M.....	4	6	3	9	18	14	66	58	11	8	161	208	9	12	30
2 to 3 P. M.....	6	6	1	5	16	9	78	53	32	22	198	95	13	15	30
3 to 4 P M.....	6	6	4	4	11	10	76	53	17	25	159	118	11	23	30
4 to 5 P. M.....	6	6	5	5	6	6	65	55	16	21	135	125	8	9	40
5 to 6 P. M.....	7	6	1	3	6	5	84	71	22	18	130	233	4	4	50
6 to 7 P. M.....	6	6	3	1	5	9	76	100	8	7	150	263	6	6	05
7 to 8 P. M.....	6	6	1	1	13	11	141	65	10	14	305	173	...	..	..
8 to 9 P. M.....	6	6	1	2	3	6	128	105	3	9	320	199	2	1	05
9 to 10 P. M.....	5	5	1	2	3	4	101	97	7	5	93	376	2	1	10
10 to 11 P. M....	6	6	...	...	5	2	76	65	...	2	35	232	...	..	..
Totals	101	105	88	88	223	175	1,465	1,113	261	211	2,795	3,081	93	..	..
Grand Total.	206		176		398		2,578		472		5,876		93	1 h. 58 m. 45 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 8, 1922

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Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	3	1	1	6	3	5	2	2	2	29	20	1	..	50
6 to 7 A. M.....	6	7	8	1	10	6	56	6	13	9	492	61	3	2	25
7 to 8 A. M.....	6	6	3	4	19	12	36	27	15	4	131	33	8	11	25
8 to 9 A. M.....	6	7	10	4	16	15	45	30	17	13	155	60	4	3	30
9 to 10 A. M.....	7	6	6	6	18	14	65	39	32	14	93	73	7	6	15
10 to 11 A. M....	6	7	7	10	18	10	67	44	21	18	70	82	8	6	35
11 to 12 A. M....	6	6	8	5	13	13	60	48	24	37	132	131	8	6	40
12 to 1 P. M.....	6	6	5	3	9	13	63	70	16	31	200	300	14	11	30
1 to 2 P. M.....	6	5	2	5	14	11	72	50	20	18	165	165	15	13	30
2 to 3 P. M.....	6	6	3	4	20	10	82	35	22	16	211	96	4	5	35
3 to 4 P. M.....	7	6	5	3	16	17	72	53	22	14	130	148	12	14	40
4 to 5 P. M.....	5	6	6	4	16	12	93	72	22	17	216	184	8	9	35
5 to 6 P. M.....	6	5	1	3	19	15	76	76	15	22	75	142	5	3	20
6 to 7 P. M.....	4	5	2	3	10	12	69	103	5	22	84	190	1	..	00
7 to 8 P. M.....	6	6	...	1	4	5	103	81	8	17	209	133	5	2	30
8 to 9 P. M.....	6	6	1	...	7	5	70	74	1	11	162	154	1	..	25
9 to 10 P. M.....	6	5	...	...	1	3	56	76	1	5	44	261	3	5	25
10 to 11 P. M....	6	6	...	...	2	4	44	50	...	2	21	193	1	2	5
Totals	102	104	68	57	218	180	1,134	936	256	272	2,619	2,426	108	106	15
Grand Total.	206		125		398		2,070		528		5,045		...	1 h. 46 m. 15 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 10, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	4	...	...	5	3	5	7	5	1	29	22	...	..	..
6 to 7 A. M.....	6	6	5	6	6	3	47	31	19	10	410	160	1	..	35
7 to 8 A. M.....	6	6	5	9	17	15	44	23	16	5	159	50	11	12	15
8 to 9 A. M.....	6	6	13	12	20	13	60	33	24	12	146	72	4	3	55
9 to 10 A. M.....	6	7	8	6	18	14	51	43	18	19	78	85	9	9	25
10 to 11 A. M....	6	6	8	11	19	12	48	40	8	15	67	80	15	24	55
11 to 12 A. M....	6	6	3	9	21	13	57	50	22	16	61	123	8	12	25
12 to 1 P. M.....	6	6	8	6	9	15	70	55	11	22	173	206	12	11	05
1 to 2 P. M.....	6	6	10	9	22	23	60	49	10	6	127	84	11	11	50
2 to 3 P. M.....	6	6	3	3	16	11	74	40	14	14	92	38	2	1	05
3 to 4 P. M.....	6	6	10	11	10	9	45	25	15	22	70	53	5	6	15
4 to 5 P. M.....	6	6	8	9	10	9	51	40	21	18	76	218	9	11	..
5 to 6 P. M.....	6	6	5	7	17	15	61	61	17	23	170	243	7	11	50
6 to 7 P. M.....	6	6	4	3	14	16	72	109	8	21	102	260	2	2	35
7 to 8 P. M.....	6	6	2	...	7	4	155	80	...	6	131	117	2	..	40
8 to 9 P. M.....	6	6	...	2	2	3	90	59	1	3	97	77	7	6	15
9 to 10 P. M.....	6	6	...	...	...	1	57	46	...	1	29	102	3	2	40
10 to 11 P. M....	6	6	...	...	1	1	40	41	...	...	11	111	...	..	..
Totals	103	107	92	102	214	180	1,087	832	209	214	2,028	2,101	108	...	..
Grand Total.	210		194		394		1,919		423		4,129		108	2 h. 7 m. 50 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

EXHIBIT 6 TO COMPLAINT

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 11, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes Min.	Trains blocked crossing: Total minutes Sec.
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.			
5 to 6 A. M.....	1	3	3	...	4	1	6	3	2	...	20	15	...	1	..
6 to 7 A. M.....	6	6	4	1	10	7	50	23	20	9	495	156	3	2	05
7 to 8 A. M.....	6	6	...	6	16	11	50	24	9	7	159	41	9	16	50
8 to 9 A. M.....	6	6	7	6	17	13	29	30	16	10	170	49	6	7	25
9 to 10 A. M.....	6	6	4	6	14	10	54	44	15	14	69	47	10	8	50
10 to 11 A. M....	6	6	13	14	12	12	50	39	13	14	51	74	9	12	05
11 to 12 A. M....	6	6	12	13	21	9	36	31	11	22	80	108	7	8	..
12 to 1 P. M.....	6	6	3	3	10	9	61	63	15	13	126	164	11	16	40
1 to 2 P. M.....	6	6	13	9	17	8	51	51	13	12	75	86	3	2	55
2 to 3 P. M.....	6	6	10	3	22	9	65	33	15	14	74	48	4	4	40
3 to 4 P. M.....	6	6	6	3	18	16	68	41	4	10	64	43	5	4	..
4 to 5 P. M.....	6	6	4	4	15	18	52	41	8	12	89	203	5	4	15
5 to 6 P. M.....	6	6	4	6	12	16	67	70	6	13	182	243	11	10	55
6 to 7 P. M.....	7	5	1	3	10	15	70	135	6	12	123	277	1	..	35
7 to 8 P. M.....	5	9	...	1	6	9	104	81	1	5	117	97	6	3	15
8 to 9 P. M.....	11	10	...	...	2	3	79	148	3	2	113	62	4	8	..
9 to 10 P. M.....	13	15	...	...	2	5	96	88	3	1	23	46	8	16	50
10 to 11 P. M....	11	12	...	...	5	2	181	50	...	...	24	79	1	..	20
Totals	120	126	84	78	213	173	1,169	995	160	170	2,054	1,838	103	...	..
Grand Total.	246		162		386		2,164		330		3,892		103	2 h. 7 m. 40 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 12, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	2	4	...	...	2	...	5	1	6	3	33	11	1	..	00
6 to 7 A. M.....	6	6	6	5	10	1	40	21	19	18	386	205	5	2	05
7 to 8 A. M.....	6	6	7	10	12	7	38	23	15	5	152	41	5	7	10
8 to 9 A. M.....	6	6	3	2	9	11	45	33	24	17	149	29	5	6	15
9 to 10 A. M.....	6	6	6	6	17	14	47	31	22	21	76	58	5	12	15
10 to 11 A. M....	6	7	4	9	25	22	43	43	15	17	42	68	18	21	35
11 to 12 A. M....	7	6	3	3	21	20	42	21	9	17	81	104	14	15	15
12 to 1 P. M.....	6	5	7	4	13	11	48	51	10	18	139	183	9	11	30
1 to 2 P. M.....	6	7	5	8	22	11	47	47	9	15	92	80	3	7	10
2 to 3 P. M.....	7	5	9	15	20	12	56	32	15	15	90	52	10	10	30
3 to 4 P. M.....	6	7	6	10	11	13	60	50	17	17	61	56	6	6	55
4 to 5 P. M.....	6	6	12	3	13	18	69	62	17	9	86	210	4	2	30
5 to 6 P. M.....	6	6	3	5	11	15	73	73	8	15	165	224	13	21	15
6 to 7 P. M.....	5	6	4	5	14	18	69	83	10	8	93	222	2	1	25
7 to 8 P. M.....	6	6	...	...	8	7	79	53	3	9	86	99	5	6	..
8 to 9 P. M.....	6	6	...	...	2	1	80	58	...	2	100	66	4	11	40
9 to 10 P. M.....	6	6	...	...	...	...	63	41	1	...	35	96	3	2	40
10 to 11 P. M....	6	6	...	...	...	1	37	40	...	...	12	64	10	15	55
Totals	105	107	75	85	210	182	941	763	200	206	1,878	1,868	122	...	..
Grand Total.	212		160		492		1,704		406		3,746		122	2 h. 42 m. 5 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

EXHIBIT 8 TO COMPLAINT

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 13, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes Min.	Trains blocked crossing: Total minutes Sec.
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.			
5 to 6 A. M.....	1	3	...	...	4	2	2	1	1	3	26	8	...	..	..
6 to 7 A. M.....	6	6	9	3	15	7	30	28	17	19	463	166	1	..	40
7 to 8 A. M.....	6	6	2	1	22	13	36	27	14	11	164	48	6	7	35
8 to 9 A. M.....	6	6	3	2	17	11	50	28	17	21	149	51	4	10	35
9 to 10 A. M.....	7	7	7	14	22	29	47	38	14	10	84	59	7	1	25
10 to 11 A. M....	6	6	8	7	14	14	49	61	11	13	69	71	6	5	25
11 to 12 A. M....	6	6	13	8	9	5	48	58	13	22	105	108	6	9	10
12 to 1 P. M.....	5	5	5	5	11	10	50	42	6	14	122	192	8	19	35
1 to 2 P. M.....	6	6	10	10	13	11	41	56	12	5	88	79	10	10	20
2 to 3 P. M.....	7	6	3	3	14	11	50	39	13	8	64	42	5	9	..
3 to 4 P. M.....	6	6	11	7	15	14	56	51	15	19	61	39	12	15	15
4 to 5 P. M.....	6	6	8	7	24	12	98	48	6	13	108	251	4	7	20
5 to 6 P. M.....	6	5	5	1	14	8	91	67	22	19	161	199	9	23	40
6 to 7 P. M.....	5	5	4	2	4	10	44	78	8	10	109	225	1	..	25
7 to 8 P. M.....	6	6	...	1	4	8	61	63	4	9	136	70	5	3	40
8 to 9 P. M.....	6	6	...	...	2	3	68	61	1	3	64	67	5	4	45
9 to 10 P. M.....	6	6	...	1	3	1	63	48	2	2	22	73	5	7	05
10 to 11 P. M....	6	6	...	...	1	1	36	34	...	...	15	101	4	5	50
Totals	103	103	88	72	208	170	920	828	176	201	2,010	1,849	98	..	..
Grand Total.	206		160		378		1,748		• 377		3,859		98	2 h. 21 m. 45 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

[fol. 34] And the said Southern Railway Company, by its attorneys, Fuller, Reade & Fuller, came and pleaded as follows:

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

SEPARATE ANSWER OF SOUTHERN RAILWAY COMPANY

Southern Railway Company, one of the three defendants to the above complaint (upon which plaintiff prays that a writ of mandamus shall be issued directing the three defendants to comply immediately with the provisions of the ordinances set forth in the complaint), answering the averments of the plaintiff's petition, says:

1. The averments of sub-divisions of the complaint numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth are true and correct and are accordingly admitted, except the portion of said sub-division Fourth, which alleges that this defendant, Southern Railway Company, at all times of day and night constantly moves and switches over this defendant's main tracks, side or spur tracks and across said grade crossing numerous freight trains cars and locomotives for serving industries and this defendant's freight depot.

2. Answering said excepted portion of said sub-division Fourth of the complaint, this defendant, Southern Railway Company, denies that it at all times of day and night constantly moves and switches over its main line tracks, side or spur tracks and across said grade crossing numerous freight cars and locomotives for serving industries and this defendant's freight depot, as alleged in the complaint, and demands that, if material, proof be a*b*duced thereof.

3. Answering the eighth sub-division of the complaint this defendant, Southern Railway Company, denies that the crossing at Chapel Hill Street, in Durham, North Carolina, was blocked on the [fol. 35] dates and for the times mentioned in the Eighth subdivision of the complaint by this defendant; and demands that, if material, proof be a*b*duced of such blocking of the crossing. Further answering this sub-division Eighth this defendant is not informed as to the user of said crossing set forth in this sub-division of the complaint, and, if material, demands proof thereof, and the same is therefore denied.

4. For a separate and complete defense to the prayer for a writ of mandamus this defendant, Southern Railway Company, shows:

This defendant, Southern Railway Company, denies that the said City of Durham has any legal right or authority under the ordinance adopted on the 20th day of March, 1922, (which ordinance

is set forth in words and figures in the Seventh sub-division of the complaint), or otherwise, to require this defendant to separate the grade of its railroads from the grade of the highway at the Chapel Hill Street crossing in Durham, North Carolina, by means of the underpass required by said ordinance, or by any other means or method, or in any other manner; and to require this defendant to pay all or any part of the expense of such grade separation.

The said ordinance of Durham, adopted on the 20th day of March, 1922, would require the three defendants herein to separate the grade of their railways from that of the highway at Chapel Hill Street crossing, in Durham, North Carolina, "by the construction of an underpass to take the place" of the present grade crossing, that is, by the construction of an underpass which will carry the highway beneath the tracks of the three railways. In thus requiring the construction of an underpass with proper approaches the ordinance is arbitrary and unreasonable and violates the constitutional rights of the defendant, Southern Railway Company, as not due process of law required by the Fourteenth Amendment of the Constitution of the United States, and as an unreasonable imposition and restraint upon interstate commerce inhibited by Article 1, Section 8, paragraph 3 of the Constitution.

[fol. 36] Under the circumstances of fact hereinafter set forth the construction of an underpass for the highway to eliminate the grades would be a wasteful and uneconomic expenditure, and would not constitute that efficient and economical management and reasonable expenditure which by Act of Congress is imposed upon this defendant as a carrier and as a condition of charking the just and reasonable rates prescribed by the Interstate Commerce Commission for interstate transportation in the decisions which have fixed the rates of this and other carriers in the Southern Group under existing Federal law. The ordinance is accordingly, also void for that compliance therewith would not be that efficient and economical management and reasonable expenditure for the maintenance of way, structures and equipment required by sub-division (2) of Section 15a of the Act of Congress known as the Act to Regulate Commerce, added thereto by one of the amendments of the Transportation Act of the 28th day of February, 1920.

This defendant is an interstate carrier by railroad engaged in interstate transportation and owning, or controlling, and operating — miles of track in the States of Virginia, North Carolina, South Carolina, Georgia, Tennessee and other States, with lines or branches into North Carolina, one of said lines passing through the City of Durham. The other two defendants, Norfolk and Western Railway Company and Seaboard Air Line Railway Company, are also interstate railroad carriers, engaged in interstate and foreign commerce in various States.

The circumstances of fact which establish that said ordinance is unreasonable, arbitrary and void will appear from the facts now to be set forth.

This defendant avers there are other, different, better, less waste-

ful and less uneconomical means of accomplishing such grade separation than by the proposed underpass, such as by means of an overhead structure to carry the highway over the tracks of this defendant and of the other defendants herein; that if it be finally and judicially determined that this defendant and said other defendants [fol. 37] herein, are legally required to make such grade separation and to bear all or any part of the expenses thereof, such an overhead structure would provide a better, much less expensive, less objectionable and less burdensome method or solution of the problem for affording relief from the alleged danger of the grade crossing than would the proposed underpass, and one providing equally as well for the safety of the public. The circumstances of fact which make such an overhead structure a better, less wasteful, less uneconomic and less burdensome solution of the grade separation problem and one providing equally as well for the public safety, and which render the requirement of the underpass, unnecessary, burdensome, arbitrary, unreasonable and void are:

(a) A reasonable first cost of approximately $160,000.00, as contrasted with an unreasanoble first cost of the proposed underpass of $258,800; both exclusive of the property cost and damage.

(b) The overhead bridge causes a minimum property damage because of the purchase of one piece of property fronting about 73 feet on Chapel Hill Street and about 204 feet on Great Jones Street, and another piece of property fronting about 180 feet on Chapel Hill Street, and it does not cause damage to other adjacent property. The proposed underpass would necessitate the approach of the public street to the railroads of the defendants herein from the south side thereof, through a deep cut for approximately two bocks, thereby pacing property abutting Chape Hill Street between said blocks above the new grade of Chapel Hill Street and depriving such owners of the right of access to and from Chapel Hill Street, or seriously interfering with such right. The proposed underpass would thus damage property fronting about 750 feet on Chapel Hill Street, about 430 feet on Great Jones Street and about 195 feet on the improved portion of Pettigrew Street lying east of Chapel Hill Street and about 235 feet on the unimproved portion of Pettigrew Street lying west of Chapel Hill Street. A number of residents living on Chapel [fol. 38] Hill Street are very much opposed to the underpass on account of property damage.

(c) In the construction of an underpass a serious interference with street traffic on Chapel Hill Street and with railroad traffic on all tracks would result, necessitating costly temporary work. This interference would extend over a period of probably twelve months. The underpass with the vertical clearance required by the ordinance would necessitate the elevation, at great expense to this defendant, Southern Railway Company, of the tracks of this defendant at Chapel Hill Street, and to such an extent as to seriously interfere with the economical performance of switching service to and from this defendant's freight depot and industries served by it. On the

other hand a steel and concrete viaduct can be constructed in such a manner as not to interfere either with traffic on Chapel Hill Street or with railroad traffic, the abutments being built entirely in the clear of the traffic and the supports in the streets being such as to cause little interference either to the railroads or to the street traffic.

(d) The proposed overhead bridge or viaduct would provide a maximum approach grade of 7 per cent as compared with a maximum approach grade of approximately 8 per cent, provided by the proposed underpass.

(e) In eliminating drainage difficulties and avoiding or minimizing sewer, water pipe and gas pipe removals or relocations, which make the underpass objectionable, unduly expensive and inherently improper.

(f) An overhead bridge gives the Railroad Companies the maximum use of their property by providing for seven or more tracks, an advantage which cannot be attained by an underpass for the reason that the space necessary for the steel spans for seven tracks is not available, except by means of the extensive and expensive bridging hereinafter referred to. The overhead bridge provids driveways at street intersections, without change of street grades, while by an un-[fol. 39] derpass material change of street grades would be required at all street intersections.

The steel girders necessary for the underpass will be dangerous to trainmen switching.

(g) The overhead bridge provides a safer highway on a viaduct, as contrasted with a dark and damp underpass, requiring artificial illumination on dark or rainy days.

(h) The proposed underpass would necessitate extensive and highly expensive bridging by this defendant, Southern Railway Company, and by the other two defendants herein, for every additional parallel track constructed within the limits of their respective rights of way across said Chapel Hill Street, whereas if an overhead bridge is provided such additional tracks could be built without such bridging or other added cost.

And for a further answer and defense to the matters and things set out in said complaint the defendant, Southern Railway Company, says:

5. That it does not own the right of way over which its trains are operated and under which the proposed underpass will be constructed, but avers and alleges that said right of way, and the tracks thereon, are the property of the North Carolina Railroad Company; that this defendant is merely the lessee of said North Carolina Railroad Company and uses said right of way and tracks by virtue of a lease from it, and it is advised and believes and, therefore, alleges that it has no legal right, and cannot be compelled, to alter and vary the existing condition of said right of way at said Chapel Hill Street

crossing at Durham, North Carolina, to the extent required by the ordinance set out in the first paragraph of the complaint filed herein, and that if this court should require and compel it to make any such change in said right of way it might, and probably would, result in a forfeiture of its rights under said lease, and any such judgment or decree would impair the obligations of the contract of lease, now subsisting between it and said North Carolina Railroad Company, and it hereby expressly pleads the lack of ownership of said right of [fol. 40] way in bar of the relief prayed for in the complaint.

Wherefore, having fully answered, this defendant prays that the writ of mandamus be refused, this action be dismissed, and that it go hence without day and recover its costs.

Fuller, Reade & Fuller, Attorneys for Southern Railway Company.

NORTH CAROLINA,
Durham County:

W. A. Gattis, being duly sworn, says that he is local and managing agent of the defendant, Southern Railway Company, in Durham, North Carolina; that he has read the foregoing answer and it is true of his own knowledge, except those matters and things therein stated upon information and belief, and as to them he believes it to be true.

Wm. A. Gattis.

Subscribed and sworn to before me, this 30th day of August, 1922. Nettie G. Fowler, Notary Public. (Notarial Seal.) My commission expires January 9th, 1924.

And the said Norfolk & Western Railway Company, by its attorney, W. B. Guthrie, came and pleaded as follows:

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

SEPARATE ANSWER OF NORFOLK AND WESTERN RAILWAY COMPANY

Norfolk and Western Railway Company, one of the three defendants to the above complaint (upon which plaintiff prays that a writ of mandamus shall be issued directing the three defendants to comply immediately with the provisions of the ordinance set [fol. 41] forth in the complaint) answering the averments of the petition says:

1. The averments of subdivisions of the complaint numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth are true and correct and are accordingly admitted.

2. Answering the Eighth sub-division of the complaint this defendant, Norfolk & Western Railway Company, denies that the crossing at Chapel Hill Street, in Durham, North Carolina, was blocked on the dates and for the times mentioned in the Eighth sub-division of the complaint by this defendant; and demands that, if material, proof be adduced of such blocking of the crossing. Further answering sub-division Eighth this defendant is not informed as to the user of said crossing set forth in this sub-division of the complaint, and if material demands proof thereof, and the same is therefore denied.

3. For a separate and complete defense to the prayer for a writ of mandamus this defendant, Norfolk and Western Railway Company, shows:

The ordinance of Durham, adopted 20 March, 1922, would require the three defendants herein to separate the grade of their railways from that of the highway at Chapel Hill Street crossing, in Durham, North Carolina, "by the construction of an underpass to take the place" of the present grade crossing, that is, by the construction of an underpass which will carry the highway beneath the tracks of the three railways. In thus requiring the construction of an underpass with proper approaches the ordinance is arbitrary and unreasonable and violates the constitutional rights of this defendant, Norfolk and Western Railway Company, as not due process of law required by the Fourteenth Amendment of the Constitution of the United States, and as an unreasonable imposition and restraint upon interstate commerce inhibited by Article 1, Section 8, paragraph 3 of the Constitution.

Under the circumstances of fact hereinafter set forth the construction of an underpass for the highway to eliminate the grades would be a wasteful and uneconomic expenditure. An overhead [fol. 42] bridge or viaduct would constitute that efficient and economical management and reasonable expenditure which by Act of Congress is imposed upon this defendant as a carrier and as a condition of charging the just and reasonable rates prescribed by the Interstate Commerce Commission for interstate transportation in the decisions which have fixed the rates of this and other carriers in the Eastern Group under existing Federal law. The ordinance is, accordingly, also void for that compliance therewith would not be that efficient and economical management and reasonable expenditure for the maintenance of way, structures and equipment required by subdivision (2) of Section 15a of the Act of Congress known as the Act to Regulate Commerce, added thereto by one of the amendments of the Transportation Act of 28 February, 1920.

This defendant is an interstate carrier by railroad engaged in interstate transportation of passengers, freight, United States mail, and express, with 2,237.88 miles of track in the States of Virginia, North Carolina, West Virginia, Kentucky, Ohio and Maryland; the

lines in general being from the port of Norfolk west to Columbu Ohio, and in Cincinatti, Ohio, respectively, with branches into Nort Carolina, one terminating at Durham and another at Winston. Th other two defendants, Southern Railway Company and Seaboar Air Line Railway Company, are similarly interstate railroad ca riers, engaged in interstate and foreign commerce in various state

The circumstances which establish that said ordinance is voi will appear from the facts now to be set forth. This defendan Norfolk and Western Railway Company, operates only passeng service over the Chapel Hill Street crossing in and out of the Du ham Union Station, consisting of two trains in each direction du ing each twenty-four hours, and perhaps once each day its shiftin engine passes over said crossing to set off exchange freight cars to i co-defendant, Southern Railway Company; it is careful to stop an flag each train over the crossing and has never had an accident ther [fol. 43] Before the ordinance was passed this defendant made pr posal of a plan for an overhead structure which would have carrie the highway over the tracks of the three railways. This structu would have extended, with approaches from Main Street in Durha to Chapel Hill Street, at proper grades with effective drainage. Th defendant attaches as a part of this answer and return to the con plaint a print of proposed overhead bridge, Chapel Hill Street, Du ham, North Carolina, marked "Exhibit 1", and numbered 10,769 showing the ground plan of the overhead structure, and typical se tion and foundation plans and the side elevation of the propose structure. This overhead crossing would have been a reasonab and proper solution of the problem, thus affording relief from dang of the grade crossing.

The circumstances of fact which made this proposed overhea crossing a reasonable solution are:

(a) A reasonable first cost of approximately $160,000.00, as co trasted with an unreasonable first cost of the proposed underpass $258,800.00, both exclusive of property cost and damage.

(b) The overhead bridge causes a minimum property damage b cause of the purchase of one piece of property, fronting about 7 feet on Chapel Hill Street and about 204 feet on Great Jones Stree and another piece of property fronting about 180 feet on Chap Hill Street, and it does not cause damage to other adjacent pro erty, whereas the proposed underpass would damage property fron ing about 750 feet on Chapel Hill Street, about 430 feet on Gre Jones Street and about 195 feet on the improved portion of Pett grew Street lying East of Chapel Hill Street and about 235 feet o the unimproved portion of Pettigrew Street lying west of Chap Hill Street. A number of residents living on Chapel Hill Street a very much opposed to the underpass on account of property damag

(c) In the construction of an underpass a serious interferen with street traffic on Chapel Hill Street and with railroad traffic o all tracks would result. This interference would extend over a perio of probably twelve months; whereas a steel and concrete viaduct ca

[fol. 44] be constructed in such a manner as not to interfere either with traffic on Chapel Hill Street or with railroad traffic, the abutments being built entirely in the clear of the traffic and the supports in the street being such as to cause little interference either to the Railroads or to the street traffic.

(d) The proposed overhead bridge or viaduct would provide a maximum approach grade of seven per cent., as compared with a maximum approach grade of seven and six-tenths per cent., provided by the proposed underpass.

(e) In eliminating drainage difficulties, which make the underpass objectionable and inherently improper.

(f) An overhead bridge gives the railroad companies the maximum use of their property by providing for seven tracks,—an advantage which cannot be attained by an underpass for the reason that the space necessary for the steel spans for seven tracks is not available. The overhead bridge provides driveways at street intersections, without change of street grade, while by an underpass material change of street grades would be required at all street intersections. The steel girders necessary for the underpass will be dangerous to trainmen switching.

(g) The overhead bridge provides a safer highway on a viaduct, as contrasted with a dark underpass, in which it would be difficult to secure and maintain proper drainage.

(h) The construction of an overhead crossing will not interfere with the future elevation of the tracks east of Chapel Hill Street.

Wherefore, this defendant prays that the writ of mandamus be refused and to be hence dismissed with its costs.

Norfolk and Western Railway Company, By N. D. Maher, President. (Corporate Seal.) Attest: L. W. Cox, Assistant Secretary. Wm. B. Guthrie, Attorney for Norfolk & Western Ry. Co.

[fol. 45] STATE OF PENNSYLVANIA,
City and County of Philadelhia:

Be it remembered, that on this 25th day of August, 1922, personally appeared before me the undersigned, a Notary Public of the State of Pennsylvania, N. D. Maher, who, being by me duly sworn according to law, deposes and says that he is President of Norfolk and Western Railway Company and that the facts set forth in the foregoing answer of said Company are correctly and truly stated according to the best of his knowledge, information and belief.

N. D. Maher.

Sworn and subscribed before me the day and year aforesaid, as witness my hand and official seal hereto affixed.
Francis P. Malone, Notary Public. (Notarial Seal.) My commission expires January 7, 1925.

NORTH CAROLINA,
Durham County:

Walter H. Pritchard being duly sworn, says that he is the Local Agent at Durham, North Carolina, of the defendant Norfolk & Western Railway Company; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to such matters he believes it to be true.

Walter H. Pritchard.

Subscribed and sworn to before me this the 30th day of August, 1922. Chas. T. Zuckerman, Notary Public. (Notarial Seal.) My commission expires Oct. 29, 1922.

And the said Seaboard Air Line Railway Company, by its attorneys, Fuller, Reade & Fuller, came and pleaded as follows:

[fol. 46] NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

SEPARATE ANSWER OF SEABOARD AIR LINE RAILWAY

Seaboard Air Line Railway Company, one of the three defendants to the above complaint (upon which plaintiff prays that a writ of mandamus shall be issued directing the three defendants to comply immediately with the provisions of the ordinances set forth in the complaint), answering the averments of the plaintiff's petition, says:

1. The averments of the sub-divisions of the complaint numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth are true and correct and are accordingly admitted, except the portion of said sub-division Fourth, which alleges that the defendant, Seaboard Air Line Railway Company, at all times of day and night constantly moves and switches over this defendant's main tracks, side or spur tracks and across said grade crossing numerous freight trains, cars and locomotives for serving industries and this defendant's freight depot.

2. Answering said excepted portion of said sub-division Fourth of the complaint, this defendant, Seaboard Air Line Railway Company, denies that it at all times of day and night constantly moves and switches over its main line tracks, side or spur tracks and across said grade crossing numerous freight trains, cars and locomotives for serving industries and this defendant's freight depot, as alleged in the complaint, and demands that, if material, proof be adduced thereof.

3. Answering the Eighth sub-division of the complaint this defendant, Seaboard Air Line Railway Company denies that the crossing at Chapel Hill Street, in Durham, North Carolina, was blocked on the dates and for the times mentioned in the Eighth subdivision of the complaint by this defendant; and demands that, if material, proof be adduced of such blocking of the crossing. Fur-
[fol. 47] ther answering this sub-division Eighth this defendant is not informed as to the user of said crossing set forth in this subdivision of the complaint, and, if material, demands proof thereof, and the same is therefore denied.

4. For a separate and complete defense to the prayer for a writ of Mandamus this defendant, Seaboard Air Line Railway Company, shows:

This defendant, Seaboard Air Line Railway Company, denies that the said City of Durham has any legal right or authority under the ordinance adopted on the 20th day of March, 1922, (which ordinance is set forth in words and figures in the Seventh sub-division of the complaint), or otherwise, to require this defendant to separate the grade of its railroads from the grade of the highway at the Chapel Hill Street crossing in Durham, North Carolina, by means of the underpass required by said ordinance, or by any other means or method, or in any other manner; and or to require this defendant to pay all or any part of the expense of such grade separation.

The said ordinance of Durham, adopted on the 20th day of March, 1922, would require the three defendants herein to separate the grade of their highways from that of the highway at Chapel Hill Street crossing, in Durham, North Carolina, "by the construction of an underpass to take the place," of the present grade crossing, that is, by the construction of an underpass which will carry the highway beneath the tracks of the three railways. In thus requiring the construction of an underpass with proper approaches the ordinance is arbitrary and unreasonable and violates the constitutional rights of this defendant, Seaboard Air Line Railway Company, as not due process of law required by the Fourteenth Amendment of the Constitution of the United States, and as an unreasonable imposition and restraint upon interstate commerce inhibited by Article I, Section 8, paragraph 3 of the Constitution.

Under the circumstances of fact hereinafter set forth the construc-
[fol. 48] tion of an underpass for the highway to eliminate the grades would be a wasteful and uneconomic expenditure, and would not constitute that efficient and economical management and reasonable expenditure which by Act of Congress is imposed upon this defendant as a carrier and as a condition of charging the just and reasonable rates prescribed by the Interstate Commerce Commission for interstate transportation in the decisions which have fixed the rates of this and other carriers in the Southern Group under existing Federal law. The ordinance is, accordingly, also void for that compliance therewith would not be that efficient and economical management and reasonable expenditure for the maintenance of way, structures and equipment required by sub-division (2) of Section 15a of

the Act of Congress known as the Act to Regulate Commerce, added thereto by one of the amendments of the Transportation Act of the 28th day of February, 1920.

This defendant is an interestate carrier by railroad engaged in interstate transportation and owning or controlling and operating 3,563.21 miles of track in the States of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama; its line of railroad in general extending from the City of Richmond, Virginia, to the City of Tampa, Florida, from the City of Portsmouth, Virginia, to Norlina, North Carolina, with lines and branches into North Carolina, one line terminating at Durham, one at Charlotte and one at Wilmington, North Carolina. The other two defendants, Southern Railway Company and Norfolk and Western Railway Company, are also interstate railroad carriers engaged in interstate and foreign commerce in various states.

The circumstances of fact which establish that said ordinance is unreasonable, arbitrary and void will appear from the facts now to be set forth. This defendant, Seaboard Air Line Railway Company, does not operate any through freight or passenger trains over said Chapel Hill Street crossing, and its operation and use of its tracks at said crossing are confined solely to switching operations incident to the handling of freight trains and cars to industrial plants served by it and to its freight depot; and that it is careful to stop and flag [fol. 49] each engine or train over said crossing. This defendant avers there are other, different, better, less wasteful and less uneconomic means of accomplishing such grade separation than by the proposed underpass, such as by means of an overhead structure to carry the highway over the tracks of this defendant and of the other defendants herein; that *it* it be finally and judicially determined that this defendant and said other defendants herein, are legally required to make such grade separation and to bear all or any part of the expense thereof, such an overhead structure would provide a better, much less expensive, less objectionable and less burdensome method of solution of the problem for affording relief from the alleged danger of the grade crossing than would the proposed underpass, and one providing equally as well for the public safety. The circumstances of fact which make such an overhead structure a better, less wasteful, less uneconomic and less burdensome solution of the grade separation problem and one providing equally as well for the public safety, and which render the requirement of the underpass unnecessary, burdensome, arbitrary, unreasonable and void are:

(a) A reasonable first cost of approximately $160,000.00, as contrasted with an unreasonable first cost of the proposed underpass of $258,800; both exclusive of the property cost and damage.

(b) The overhead bridge causes a minimum property damage because of the purchase of one piece of property fronting about 73 feet on Chapel Hill Street and about 204 feet on Great Jones Street, and another piece of property fronting about 180 feet on Chapel Hill Street, and it does not cause damage to other adjacent property. The proposed underpass would necessitate the approach of the public

street to the railroads of the defendants herein from the south side thereof, through a deep cut for approximately two blocks, thereby placing property abutting Chapel Hill Street between said blocks above the new grade of Chapel Hill Street and depriving such owners of the right of access to and from Chapel Hill Street, or seriously interfering with such right. The proposed underpass would thus damage property fronting about 750 feet on Chapel Hill Street, about 430 [fol. 50] feet on Great Jones Street and about 195 feet on the improved portion of Pettigrew Street lying east of Chapel Hill Street and about 235 feet on the uni-proved portion of Pettigrew Street lying west of Chapel Hill Street. A number of residents living on Chapel Hill Street are very much opposed to the underpass on account of property damage.

(c) In the construction of an underpass a serious interference with street traffic on Chapel Hill Street and with railroad traffic on all tracks would result, necessitating costly temporary work. This interference would extend over a period of probably twelve months. The underpass with the vertical clearance required by the ordinance would necessitate the elevation, at great expense to this defendant, Seaboard Air Line Railway Company, of the tracks of this defendant at Chapel Hill Street, and to such an extent as to seriously interfere with the economical performance of switching service to and from this defendant's freight depot and industries served by it. On the other hand a steel and concrete viaduct can be constructed in such a manner as not to interfere either with traffic on Chapel Hill Street or with railroad traffic, the abutments being built entirely in the clear of the traffic and the supports in the streets being such as to cause little interference either to the Railroads or to the street traffic.

(d) Such an overhead bridge or viaduct would provide a maximum approach grade of 7 per cent, as compared with a maximum approach rade of approximately 8 per rcent, provided by the proposed underpass.

(e) In eliminating drainage difficulties and avoiding or minimizing sewer, water pipe and gas pipe removals or relocations, which make the underpass objectionable, unduly expensive and inherently improper.

(d) Such an overhead bridge or viaduct would provide a maximum approach grade of 7 per cent, as compared with a maximum approach -rade of approximately 8 per cent, provided by the proposed underpass.

(e) In eliminating drainage difficulties and avoiding or minimizing sewer, water pipe and gas pipe removals or relocations, which make the underpass objectionable, unduly expensive and inherently improper.

(f) An overhead bridge gives the Railroad Companies the maximum use of their property by providing for seven or more tracks, an advantage which can not be attained by an underpass for

the reason that the space necessary for the steel spans for seven tracks is not available, except by means of the extensive and expensive [fol. 51] bridging hereinafter referred to. The overhead bridge provides driveways at street intersections, without change of street grades, while by an underpass material change of street grades would be required at all street intersections. The steel girders necessary for the underpass will be dangerous to trainmen switching.

(g) The overhead bridge provides a safer highway on a viaduct, as contrasted with a dark and damp underpass, requiring artificial illumination on dark or rainy days.

(h) The proposed underpass would necessitate extensive and highly expensive bridging by this defendant, Seaboard Air Line Railway Company, and by the other two defendants herein, for every additional parallel track constructed within the limits of their respective rights-of-way across said Chapel Hill Street whereas if an overhead bridge is provided such additional tracks could be built without such bridging or other added cost.

Wherefore, this defendant prays that the writ of mandamus be refused and to be hence dismissed with its cost.

Seaboard Air Line Railway Company, By M. H. Cahill, Vice-President. Fuller, Reade & Fuller, Attorneys for Seaboard Air Line Railway Company.

STATE OF VIRGINIA,
City of Norfolk:

M. H. Cahill, being duly sworn, says that he is an officer, towit: Vice-President, of defendant, Seaboard Air Line Railway Company; that he has read the foregoing answer and it is true of his own knowledge except those matters and things therein stated upon information and belief, and as to them he believes it to be true.

M. H. Cahill.

Subscribed and sworn to before me this 29th day of August, 1922. S. B. Parkinson, Notary Public. (Notarial Seal.) My commission expires 1-6-25.

[fol. 52] I hereby certify this is a case in which, by the laws of Virginia no tax is required upon the seal.

S. B. Parkinson, Notary Public.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(TITLE OF CAUSE)

WRIT OF MANDUMUS

This cause coming on to be heard upon application for a Writ of Mandamus, before the undersigned, His Honor George W. Connor, Judge Presiding in the Tenth Judicial District, the hearing having been continued by consent, and set for hearing at Chambers at Durham on the 16th day of September, 1922 and after hearing read the Complaint and Answers of each of the defendants the argument of counsel for the plaintiff and counsel for the defendants, the Court being of the opinion that no issue of fact for trial by jury is raised upon the pleadings, finds the following facts from the pleadings:

1. That the plaintiff is a municipal corporation of the State of North Carolina, and among other powers in its charter delegated to its City Council the governing authority by Section 10 of its charter is the following:

"The City Council shall have full power and authority, except as otherwise provided for in this act, to exercise all of the powers conferred upon and delegated to the City of Durham by this charter and by the laws of North Carolina. The City Council shall have power to make such ordinances, rules and regulations as it may deem necessary for the proper government of the City to promote and safeguard the health, morals, safety and general welfare and convenience of the public. The City Council may provide for the proper enforcement of such ordinances, in such manner as it may think best, by fine, imprisonment or otherwise."

[fol. 53] That among the powers delegated to said City by Consolidated Statutes of the State of North Carolina, as will appear by reference to Section 2793 thereof, are the following:

"The governing body of the city shall have power to control, grade, macadamize, cleanse, and pave and repair the streets and sidewalks of the city and make such improvements thereon as it may deem best for the public good, and may provide for and regulate the lighting of the public parks, and regulate, control, license, prohibit, and prevent digging in said streets and sidewalks, or placing therein of pipes, poles, wires, fixtures, and appliances of every kind, whether on, above, or below the surface thereof, and regulate and control the use thereof by persons, animals and vehicles; to prevent, abate, and remove obstructions, encroachments, pollution or litter therein; and shall have under its government, management, and control all parks and squares within or without the city limits established by the governing body for the use of the city except as otherwise provided."

Also Section 3449 of the Consolidated Statutes as follows:

"Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city, town, township or road district having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same. If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within thirty days from and after the service of the notice, it shall be guilty of a misdemeanor and shall [fol. 54] be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense. This section shall in no wise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law."

2. That Chapel Hill Street is one of the main streets or thoroughfares of said municipality, running in an easterly and westerly direction, the western portion of which connects with the Chapel Hill Boulevard of the State Highway leading to the town of Chapel Hill in Orange County; that said street, except for several hundred feet on either side of the right-of-way hereinafter referred to, has recently been permanently paved, and said street is the leading thoroughfare connecting the northern and southern portions of said city, and is used and occupied by the Durham Public Service Company with its tracks over which it operates a line of street railway.

3. That the defendant, Southern Railway Company, operates a line of steam railway over its tracks on its right-of-way, two hundred feet in width, through the City of Durham, crossing said Chapel Hill Street at grade near the center of said city; that the defendant, Norfolk & Western Railway Company operates a line of steam railway over its tracks, located on a portion of the right-of-way of the Southern Railway Company, which said tracks cross Chapel Hill Street at a grade at the point above mentioned; that the defendant, Seaboard Air Line Railway Company, operates a steam railway over its tracks located on the portion of the said right-of-way of the Southern Railway Company, which said tracks cross Chapel Hill Street at grade and point above mentioned.

4. That within a radius of approximately eight hundred yards of said Chapel Hill Street grade crossing are located the freight depots

of each of the defendants, and large industrial plants, all of which [fol. 55] are served with side or spur tracks connecting with the main line track of the defendants; that over said main tracks and across said grade crossing are constantly moved and switched numerous freight trains, cars and locomotives serving said industries and depots, and in addition thereto many through passenger and freight trains.

5. That during the last five years several more or less serious accidents have occurred at said grade crossing; said grade crossing is extensively used by street cars, motor vehicles, horse drawn vehicles and pedestrians.

6. That the governing body of the City of Durham has fully and carefully investigated the conditions existing at this grade crossing and did on the 20th day of March, 1922, adopt an appropriate ordinance as follows:

"Whereas, The Greensboro and Goldsboro line of the Southern Railway crosses Chapel Hill Street at grade, near the center of the City of Durham, North Carolina, and,

"Whereas, the right-of-way of said railway at that location is two hundred feet wide, the same being occupied by the tracks of the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, certain of which said tracks are sometimes used by equipment of other railway companies, tenants of said Southern Railway Company, which location is a part of the freight and switch yard of two of said railway companies, where the shifting of engines cars and trains, both freight and passenger, is a constant practice during the hours of day and night all of which is in addition to the movement of through freight and passenger trains over said tracks, and,

"Whereas, approximately 120 street cars, 260 heavy trucks, 170 delivery wagons, 788 passenger automobiles, 400 horse drawn vehicles with their passengers, drivers and operators, together with 3,600 pedestrians, including many school children, use said grade crossing daily between the hours of seven o'clock A. M., and seven o'clock P. M., and,

"Whereas, the city Council finds and so declares that the con- [fol. 56] tinued maintenance of said grade crossing is dangerous to life, limb and property, and that the safety, comfort, convenience and welfare of the public requires its elimination, and,

"Whereas, the City Council, after having open negotiations with the officials of the said railway companies regarding the said grade crossing, did upon the suggestion of said railway officials, refer the matter to a joint body consisting of the City Manager, City Consulting Engineer and the engineering representatives of the said railway companies for the purpose of reaching an agreeable solution of the elimination of said grade crossing, and,

"Whereas, the Consulting Engineer of the City recommends the said grade crossing can best be eliminated by the building of an underpass, and has submitted plans covering same, and,

"Whereas, the railway engineers have submitted in addition to plans for an underpass, counter-plans for a bridge, and,

"Whereas, the City Council, after full and careful consideration, finds and so declares that an underpass instead of a bridge will better meet the needs, safety, convenience and welfare of the public, and that the same can be constructed for the same cost or less than the cost of the bridge, and,

"Whereas, the City Manager and Consulting Engineer report that they and the railroad engineers are substantially agreed upon a general plan for an underpass; be it therefore, "Ordained by the City Council of the City of Durham."

Section 1. That the grade crossing at Chapel Hill Street occupied and used by the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, and occasionally by tenant roads of the said Southern Railway Company, is a menace to the public safety, is dangerous to life, limb and property, and the City Council finds and so declares that the safety, comfort and convenience and welfare of the public requires the elimination of said grade crossing by the construction of an underpass to take the place thereof.

Section 2. That the Southern Railway Company, Seaboard Air [fol. 57] Line Railway Company and the Norfolk & Western Railway Company, which said railway companies are now occupying and using tracks crossing the said Chapel Hill Street at grade are hereby ordered and directed to eliminate said grade crossing by constructing an underpass with proper approaches in the place thereof.

Section 3. That the said underpass structure shall have a minimum overhead clearance of thirteen feet; that center supports, if used, must not be more than eighteen inches in thickness, the center line of which must be concentric with the center line of Chapel Hill Street, as established by the City Engineer; that the horizontal clearance between the centre supports and the curb on each side shall not be less than twenty feet, that the sidewalks through said underpass shall not be less than six feet wide in the clear; that the abutment walls shall set flush with or back of the building lines as established by the City Engineer, that the finished surface of Chapel Hill Street at the apex of the crown shall not be lower than El. 383.5 as referred to the standard bench mark datum of the Engineering Department of the City of Durham; that solid non-leakable floors shall be provided in the super-structures, that the detail plans for said underpass shall be submitted to the City Engineer for his criticism and shall be approved by him before the beginning of construction work.

Section 4. That the active construction work on said underpass shall be started not later than sixty days from that adoption of this ordinance and same shall be completed within two hundred and eighty working days thereafter.

Section 5. That this ordinance shall take effect from and after the 20th day of March, 1922."

7. That the continued maintenance of said grade crossing is very dangerous to life, limb and property, is a menace to the public safety and detrimental to the comfort, convenience and welfare of the people; that the elimination of said grade crossing and the removal of this danger is necessary and required for the public safety; that the safety of life, limb and property, and the comfort, convenience [fol. 58] and welfare of the public and public safety, require and will be subserved and promoted by the construction of an underpass under said crossing with the proper approaches thereto, all as is provided for in said ordinance above set out.

Upon the foregoing findings of fact the court finds that the City of Durham had ample authority under its police powers and the several statutes applicable to enact the ordinance above set out, and that said ordinance is valid and reasonable, and was not arbitrarily or capriciously passed, but was enacted with a view solely to protecting the public safety, it is therefore.

Ordered, and the Southern Railway Company, Norfolk & Western Railway Company and the Seaboard Air Line Railway Company are commanded forthwith to eliminate and abolish the grade crossing on Chapel Hill Street in the City of Durham, by constructing an underpass with proper approaches thereto, all as provided for and directed by the ordinance hereinbefore set out.

The defendants are further ordered and commanded to begin the active construction work on said underpass not later than sixty days from the sixteenth day of September, 1922, and to prosecute the construction of said underpass with due and proper diligence and to complete the same within two hundred and eighty working days after the beginning of the active construction work.

The City of Durham agrees to do all underground work such as the relaying and replacing of water, gas and sewerage mains, street paving including curbs and gutters and also sidewalks.

The City of Durham hereby consents that the defendants, its officers, agents and employees shall have the right and privilege to enter upon that portion of Chapel Hill Street and the sidewalks adjacent thereto, which may be necessary to be entered upon, and such other streets as enter into Chapel Hill Street, to properly construct said [fol. 59] underpass and to properly construct the approaches thereto; and the City of Durham further consents that the defendants may lower the grade of Chapel Hill Street to such elevation as may be proper and necessary for the construction of said underpass and the approaches thereto, in conformity with the plans and specifications of the City Engineer of the City of Durham.

Geo. W. Connor, Judge Presiding in the Tenth Judicial District.

Exceptions

To the foregoing order and judgment each and all of the defendants except and assign the same as error and appeal to the Supreme Court.

Exception No. 1.

Notice of appeal given in open court and waived. Appeal bond in the sum of $200.00 is adjudged sufficient.

By consent the following shall constitute the case on appeal:

1. Summons
2. Complaint
3. Answer Southern Rwy. Co.
4. Answer Norfolk & Western Rwy. Co.
5. Answer Seaboard Air Line Rwy. Co.
6. Order and judgment.

The enforcement of the foregoing order and judgment is stayed pending the appeal and hearing thereon of defendants to the Supreme Court.

Dated at Durham, N. C., this September 16th, 1922.

Geo. W. Connor, Judge etc.

The defendants, each and all of them, and in apt time made the following motions:

[fol. 60] NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

[Title omitted]

Motion of Southern Railway Company

The above named defendant hereby moves the Court to continue this action and proceed no further therein until the issues of fact raised herein by its answer can be decided by a jury at the next regular term of the Superior Court of Durham County, North Carolina.

This September 16, 1922.

Fuller & Fuller, Attorneys for Southern Railway Company.

The foregoing motion is overruled, and the above named defendant excepts.

Exception No. 2.

Geo. W. Connor, Judge Presiding.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

[Title omitted]

Motion of Seaboard Air Line Railway Co.

The above named defendant hereby moves the Court to continue this action and proceed no further therein until the issues of fact [fol. 61] raised herein by its answer can be decided by a jury at the

next regular term of the Superior Court of Durham County, North Carolina.

This September 16th, 1922.

Fuller & Fuller, Attorneys for Seaboard Air Line Railway Company.

The foregoing motion is overruled, and the above named defendant excepts.
Exception No. 3.

Geo. W. Connor, Judge Presiding.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

[Title omitted]

Motion of Norfolk & Western Railway Co.

The above named defendant hereby moves the Court to continue this action and proceed no further therein until the issues of fact raised herein by its answer can be decided by a jury at the next regular term of the Superior Court of Durham County, North Carolina.

This September 16th, 1922.

W. B. Guthrie, Attorney for Norfolk & Western Ry. Co.

The foregoing motion is overruled, and the above named defendant excepts.
Exception No. 4.

Geo. W. Connor, Judge Presiding.

[fol. 62] NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

Exceptions Grouped and Numbered

Exception No. 1

The action of His Honor in signing the order and judgment set out in the record (pages 37, 38, 39, 40, 41, 42, 43 and 44).

Exception No. 2

The action of His Honor in over-ruling the motion of defendant Southern Railway Company as set out in the record (page 45).

Exception No. 3

The action of His Honor in over-ruling the motion of defendant Seaboard Air Line Company as set out in the record (page- 45 and 46).

Exception No. 4

The action of His Honor in over-ruling the motion of defendant Norfolk & Western Railway Company as set out in the record (page 46).

In Superior Court of Durham County

Assignments of Error

1. His Honor erred in his failure to hold that the pleadings raised an issue of fact triable by a jury and the same is assigned as error.

1a. His Honor erred in over-ruling the motions of the defendants to continue the consideration and trial of this action until the issues of fact raised by their answers could be decided by a jury at the next regular term of the Superior Court of Durham County, North Carolina. (Record, pages 45 and 46.)

2. His Honor erred in holding as matter of law and without evi- [fol. 63] dence that the facts set up in the answers of the three defendant railway companies did not constitute a defense by the averments that an overhead bridge would be reasonable and that the underpass required by the ordinance is arbitrary and unreasonable as a restraint upon interstate commerce inhibited by Article I, Section 8, Paragraph 3 of the Constitution.

3. His Honor erred in holding as matter of law and without evidence that the facts set up in the answers of the three defendant railway companies did not constitute a defense by the averments that such overhead bridge would constitute efficient and economic management and reasonable expenditure imposed upon the interstate carriers by Section 15a, Sub-division (2), of the Act of Congress known as the Act to Regulate Commerce as amended by the Transportation Act of 28 February, 1920, and these holdings are assigned as error.

4. His Honor erred in assuming jurisdiction of this proceeding, for that jurisdiction to try and determine matters of the kind referred to in the complaint is vested fully and exclusively in the Corporation Commission of North Carolina, which is a Court of Record, and which by Section 1048 of the Consolidated Statutes of North Carolina is vested with the jurisdiction of the relief sought in this proceeding, and said Commission is directed and empowered, to require the raising or lowering of any tracks or highways at any highway or railroad crossing, and to designate who shall pay for the same; and when they think proper to partition the costs of abolishing grade crossings, or the raising or lowering of said tracks or highways among

the railroads and municipalities interested, and in His Honor's assuming jurisdiction of this proceeding the same is assigned as error.

5. His Honor erred in his failure to hold as prayed for by defendants in their answers that the ordinance in question of the plaintiff City is arbitrary and unreasonable and violates the constitutional rights of defendants as not due process of law required by the Four-[fol. 64] teenth Amendment of the Constitution of the United States, and as an unreasonable imposition and restraint upon interstate commerce inhibited by Article I, Section 8, paragraph 3 of the Constitution. And the failure of His Honor to so hold is assigned as error.

6. His Honor erred in his failure to hold as prayed for by defendants in their answers that a compliance by the defendants with the ordinance in question of plaintiff City would not be that efficient and economical expenditure for the maintenance of way, structures and equipment by subdivision (2) of Section 15a of the Act of Congress known as the Act to Regulate Commerce, added thereto by one of the Amendments of the Transportation Act of February 28th, 1920. And the failure of His Honor to so hold is assigned as error.

7. His Honor erred in entering the order and judgment set out in the record granting to the plaintiff City the relief prayed for and the same is assigned as error.

Dated this the 16th day of September, 1922.
Fuller, Reade & Fuller, W. B. Guthrie, Attorneys for Defendants, Appellants.

Filed this the 17th day of October, 1922.
W. H. Young, Clerk Superior Court, Durham County, N. C.

North Carolina,
Durham County:

In the Superior Court

(Title of Cause)

Stipulation as to Exhibit No. 1

It is hereby stipulated and agreed between the above named plaintiff and the above named defendants that Exhibit I referred to in the answer of the defendant, Norfolk & Western Railway Company, numbered 10769 c, showing the ground plan of the overhead structure and typical section and foundation plans and the side elevation thereof, which said overhead structure is referred to in the answers of the above named defendants, need not be printed as a part of [fol. 65] the transcript of the record on appeal to the Supreme Court of North Carolina in the above case, but that the defendants may furnish five copies thereof for use by the Supreme Court and one or

more copies to the plaintiff, and that said five copies, or other copies thereof, may be referred to and used in the argument and briefs in the Supreme Court.

The City of Durham, By S. C. Chambers, Attorney. Southern Railway Company, By Fuller & Fuller, Attorneys. Norfolk & Western Railway Company, By W. B. Guthrie, Attorney. Seaboard Air Line Railway Company, By Fuller & Fuller, Attorneys.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

APPEAL BOND

Whereas, in the above entitled action judgment was rendered on the 16th day of September, 1922, at Durham Superior Court by His Honor, George W. Connor, Judge presiding, in favor of the above named paintiff and against the above named defendants, from which judgment said defendants appealed to the Supreme Court of North Carolina, and His Honor adjudged that said defendants should execute an appeal bond in the sum of Two Hundred Dollars.

Now, therefore, the undersigned, Southern Railway Company, Norfolk & Western Railway Company, and Seaboard Air Line Rail- [fol. 66] way Company, as principals, and L. D. Kirkland, as surety, undertake in the sum of Two Hundred Dollars to pay to the plaintiff all such costs as may be adjudged against said defendants by the Supreme Court of North Carolina on account of said appeal.

This 28th day of October, 1922.

Southern Railway Company, By Fuller & Fuller, Attorneys. Norfolk & Western Railway Company, By W. B. Guthrie, Attorney. Seaboard Air Line Railway Company, By Fuller & Fuller, Attorneys. L. D. Kirkland. (Seal.)

Filed, accepted and approved this the 28th day of October, 1922. W. H. Young, Clerk Superior Court, Durham County, North Carolina.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

[Title omitted]

STIPULATION FOR AMENDMENT OF CASE ON APPEAL

Agreement and Stipulation

The City of Durham hereby agrees that the case on appeal to the Supreme Court in the above entitled action as settled by His Honor George W. Connor, Judge of the Superior Court, who rendered the [fol. 67] judgment from which this appeal is taken, may be amended by adding thereto motions in writing by each of the defendants demanding that the alleged issues of fact raised by their answers should be referred to a jury for determination and that the Court should not proceed further in this action until such issues were so determined: the statement that the Judge overruled said motions and that the defendants excepted; also by adding an additional assignment of error by the defendants alleging that the trial Judge committed error in overruling the motions above referred to; and this agreement and stipulation.

S. C. Chambers, Attorney for City of Durham. W. B. Guthrie, Fuller & Fuller, Attorneys for Defendants.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

CLERK'S CERTIFICATE

I, W. H. Young, Clerk of the Superior Court of Durham County, State of North Carolina, do hereby certify that the foregoing is a full, true and perfect transcript of the record in a civil action pending in said Court, wherein the City of Durham is plaintiff and the Southern Railway Company, Norfolk & Western Railway Company and the Seaboard Air Line Railway Company are defendants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said court, at my office in Durham, on this 6th day of November, 1922.

W. H. Young, Clerk of the Superior Court of Durham County.

[fol. 68] IN THE SUPREME COURT OF NORTH CAROLINA

DOCKET ENTRIES

Appeal from Superior Court Durham County docketed 16 January 1923; case argued 27 March 1923; opinion filed 4 April 1923 as follows:

[fol. 69] NORTH CAROLINA SUPREME COURT SPRING TERM 1923

#331. Durham

[Title omitted]

Appeal by Defendants from an Order for Mandamus Made by Conor, J., at Chamber, in Durham, 16 September, 1922

OPINION

The plaintiff made application for mandamus to compel the railroad companies to eliminate the grade crossing on Chapel Hill street over the railway tracks of the defendants and to build an underpass under said tracks. Chapel Hill street is one of the main streets for traffic in said city connecting the northern and southern portions of the city and leading from Durham to Chapel Hill. The three defendant railroads have tracks crossing that street on a grade on which are operated both passenger and freight cars. It is alleged and not denied that in a radius of approximately 800 yards of this Chapel Hill street grade crossing are located the freight depots of all three defendants, large tobacco plants and factories, ice and power plants, flour mills, hosiery mills, all of which depots and industries are served with side or spur tracks connected with the main line tracks of the defendants over which are operated constantly, during day and night, passenger trains, freight trains and switching engines.

In paragraph 5 it is alleged that several accidents have occurred at this grade crossing in which people, animals and vehicles have been injured.

In paragraph 6 it is alleged that the governing authorities of the city of Durham, finding that the continued maintenance of said grade crossing is a great inconvenience to the whole people, seriously interrupting and impeding street traffic and is dangerous to public travel, employed and expert consulting engineer to advise said governing authorities of the said city if it were practicable and feasible to change or alter said grade crossing in order that the same might be made safe and convenient for the traveling public and that said engineer after full investigation recommended that said grade crossing could best be made safe by separating the street and railroad grades and passing the street underneath the railroad tracks by means of an underpass and that the said city council invited the de-
[fol. 70] fendants to have their representatives meet with it and its

representatives with the view of having said defendants remedy said grade crossing by the building of an underpass in the place thereof. And that many conferences were held by and between engineer of the city and the defendant companies which resulted in no definite or satisfactory agreement.

In paragraph 7 of the complaint it is alleged that on 20 March 1922, the city council, the governing authorities of the city of Durham, adopted an ordinance which after reciting the above facts, directed that the grade crossing should be eliminated by the construction of an underpass for the street and directing the defendant railroad companies to eliminate said grade crossing and construct the underpass with proper approaches, fixing the width and height of the underpass and its method of construction and also directing that the said work be begun within 60 days and completed within 280 working days thereafter, and that a copy of said ordinance was duly served upon the said defendant railroad companies.

In paragraph 8 of the complaint it is alleged that the city caused to be made a record of the street traffic along and over said street and over said grade crossing, which record is attached to the exhibits to the complaint, showing an average of nearly 4,000 pedestrians and bicycles had crossed this grade crossing a day; over 500 horse-drawn vehicles and more than 2,000 passenger automobiles, more than 350 delivery wagons, over 100 heavy trucks and over 200 street cars; and that there were more 100 times during the same hours, towit: from 5 o'clock in the morning until 11 o'clock at night, the trains and switch engines crossing Chapel Hill Street blocked the crossing between those hours a total obstruction of 1¾ hours per day.

The railroad companies answered admitting the averments above recited with the qualification that they did not at all times of day and night move the trains over said crossing and they denied that the crossing at Chapel Hill street was blocked to the extent alleged in the complaint and also in a separate defense alleged that an overhead bridge would be more economical to construct than an underpass; that the requirement of the building of an underpass was unreasonable and oppressive and a burden upon Interstate commerce and not [fol. 71] permitted by the Transportation Act of Congress and that the ordinance of the City of Durham was arbitrary and not due process of law, was a violation of the commerce clause of the Constitution and that the jurisdiction to require the raising or lowering of the tracks at a highway crossing was exclusively with the Corporation Commission of the State of North Carolina.

The railroad companies also moved that the action be continued and no order be made therein until the issues of fact raised could be decided by a jury at a regular term of the Superior Court of Durham County. The court overruled the motion and defendants excepted. From the judgment granting a mandamus, the defendants also excepted and appealed.

S. C. Chambers, J. S. Manning and W. J. Brogden for plaintiff.

Fuller & Fuller, W. B. Guthrie, Manly, Hendren & Womble, L. E. Jeffries, Theodore W. Reath and Jas. F. Wright for defendants.

CLARK, C. J.:

The refusal by the court of the motion to continue the hearing and transfer the case to the civil issue docket of the Superior Court for trial by jury was not erroneous for no issues of fact are raised by the answer. The defendants rely upon C. S. 868 but the relief sought by the plaintiffs is not for the enforcement of a money demand and that Sec. authorizes the summons to be returnable before the judge at chambers not less than ten days after service of summons in the complaint, "at which time the court, except for good cause shown, should hear and determine the action both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court upon the motion of either party to continue the action until the issue of fact can be decided by jury at the next regular term of the court". The contention of the defendants is that the answer raised issues of fact because they qualified their admission of the truth of the averment in paragraph 4 as to the volume of the traffic over this grade crossing to the extent averred in paragraphs 4 and 8 of the complaint; but neither of these denials raised an issue of fact. Neither did the assertion in the answer that the underpass would be more expensive than a bridge and therefore that the action of the governing authorities of the city of Durham was arbitrary, unreasonable and oppressive. These defenses raised no issues of fact to be tried by jury and the latter was a question of fact for the court. [fol. 72] In Lee v. Waynesville, 184 N. C., 565, it was held that the courts will not interfere with the statutory discretionary powers given to the governing authorities of an incorporated town to take land from adjoining owners in widening its streets for the public welfare unless their action in doing so is so unreasonable as to amount to an oppressive and manifest abuse of the exercise of this discretion under C. S. 2791, 2792, citing numerous cases.

It is admitted in this case that this Chapel Hill street is one of the main streets and most important thoroughfares in the City of Durham, connecting as it does the northern and southern section of the city and is the thoroughfare leading from Durham to Chapel Hill. It is traversed by thousands of people daily and the question whether or not the public safety demanded elimination of the grade crossing was one in the legislative power of the governing authorities of the city of Durham and their decision is conclusive and final unless it was shown that it is clearly oppressive or amounts to abuse of their discretion. The denial as to the number of times a day the crossing was broken by passenger and freight trains or switch engines, and of the exact number of pedestrians, bicycles, authomobiles and other vehicles crossing per day is clearly a mere evidentiary matter and does not constitute issues of fact in view of the admission that Chapel Hill street is one of the main streets or thoroughfares in said city over which so large a volume of traffic and travel passes every day. This court has repeatedly held that mere evidentiary matters do not raise issues of fact. This is clearly stated in Edgerton v. Kirby, 156 N. C., 347, and also in Jackson v. Telegraph Company, 139 N. C., 347, in which the court said: "We do not approve of issues which as in this case embody evidentiary facts instead of the ultimate facts to

be found by the jury and which are therefore the only issuable facts. Grant v. Bell, 87 N. C. 34; Patton v. R. R., 96 N. C., 455."

The city made out a prima facie case when it showed the enactment and passage of the ordinance, which was admitted by the three railroads. The judge properly held that a presumption existed in favor of the validity of the ordinance and the burden was upon the railroad to show otherwise which they declined to do. The judge was ready to [fol. 73] hear and determine the action but the railroads failed to offer testimony or evidence of any kind whatever. It did not devolve upon the city to prove that the crossing was blocked on the dates mentioned to the exact extent as alleged in the complaint as the burden of proving the ordinance invalid or unreasonable was on the defendants either by showing that in fact the railroads did not block the crossing; that traffic was not impeded; and that the crossing is not dangerous. That the governing body exceeded its powers, or committed fraud and opression, constituting a manifest abuse of discretion are questions of law for the court. The burden is upon the defendants to show affirmatively that there was an abuse of discretion and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the court. Crotts v. Winston, 170 N. C., 27; Small v. Edgerton, 146 N. C., 527; Tate v. Greensboro, 114 N. C. 399. There must be sufficient facts alleged to show that the ordinance is unreasonable and oppressive before it can become an issue of fact for the jury.

The defendants contend, however, that by reason of the enumeration of certain powers in the city charter, among others, "To require railroad companies to erect gates at crossings or to place flagmen to warn the public of the approach of trains," restricted the city's right to exercise only the powers specifically mentioned and that C. S. 1048 confers upon the Corporation Commission sole jurisdiction over the subject matter of this controversy. But the last paragraph of Sec. 48 of the city charter recites that the powers enumerated therein "Shall not be held or deemed to be exclusive"; that it shall have all the powers conferred by the several statutes applicable.

This question, which is the one most relied upon by the defendants in this cause, was fully settled in R. R. v. Goldsboro, 155 N. C., 362, where this court said: "The plaintiff earnestly contends that inasmuch as Rev. 1097 (10) (now C. S. 1048) authorized the Corporation Commission to require the raising or lowering by a railroad of its track or highway at any crossing and to designate who shall pay for the same, this deprives the city of Goldsboro of the right to exercise its police power in that regard. The provision just cited giving the Corporation Commission the power stated is not in derogation of that conferred in the charters of towns and cities but is supplemen- [fol. 74] tary merely." In that case R. R. v. Goldsboro, the exact point is so fully and clearly discussed with citations of Federal decisions and decisions from other states that it is unnecessary to repeat what is there said.

Our decision in that case was affirmed on a Writ of Error, R. R. v. Goldsboro, 232 U. S. 548, and in the citations at the end of that opinion in the Anno. Ed.

Since that volume was annotated, the case has since been reaffirmed in Borden v. R. R., 175 N. C. 179; Powell v. R. R., (Hoke, J.) 178 N. C., 245; In re Utilities Co., 179 N. C. 159, 160; Goff v. R. R., Ib. 224; Raleigh v. Power Company (Brown, J.) 180 N. C. 237; Durham v. Public Service Company, 182 N. C., 338.

The findings of fact by the city in the exercise of its legislative and police powers made out a prima facie case and the railroads failed to offer any testimony or evidence to show abuse of discretion or unreasonableness. Only two questions can arise: (1) Did the city possess the power to enact the ordinance; (2) Is the ordinance a reasonable exercise of the power?

Full power has been conferred upon the governing body of the city to enact such ordinances as are necessary to promote and safeguard the health, safety and general welfare of the public. Besides the powers expressly given in the charter, the city possesses the powers conferred by Chap. 136, Laws 1917, and the last paragraph of Sec. 48 of the Charter of Durham, Chap. 42, Private Laws 1921, read as follows: "The enumeration of particular powers by this charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated or implied herein, the City of Durham, either through its city council or through such other officers as may be provided, shall have and may exercise all other powers which under the Constitution and laws of N. C., now are, or hereafter may be granted to cities."

The city having exclusive control of its streets, the question in the first instance was one for the local authorities. McQuillan, 7 Municipal Corporations, Sec. 955.

In St. Paul v. R. R., L. R. A. 1917-C, 1174, the Court said: "The determination that public necessity requires a separation of crossing grades and the method of accomplishing it, is in the first instance a legislative act for the common council," and further, "The separa-
[fol. 75] tion of grades may be effected either by compelling the railroad to depress its tracks and carry the street over them, or by compelling it to carry the street over or under the crossing grade of the railroad, as reasonable public necessity may require."

The ordinance in this case was enacted under an exercise of the police power and authority conferred in the charter and the several statutes applicable.

In Powell v. R. R., 178 N. C., 245, this Court said: "The right of the city government both under its police powers and the several statutes applicable to require railroads to construct bridges along streets running over their tracks, is fully established in this jurisdiction and is recognized in well-considered cases elsewhere."

In Minneapolis v. R. R., 28 L. R. A. (N. S.) 306, the Court said: "The tendency of modern development is in the direction of greater, rather than more restricted, use of police power, and necessarily so in order to meet the new dangers and increase of old dangers, constantly occurring as natural incidents of advancing civilization. We think the weight of modern authority is in accord with the views just expressed, and to the effect that everything that goes to make a crossing safe for public use is as essentially within police regulations as

any part of it." This was cited in R. R. v. Goldsboro, 155 N. C., at p. 360 (affirmed on writ of error, U. S. Supreme Court 232 U. S.)

R. R. v. Goldsboro was cited with approval in R. R. v. Omaha, 235 U. S., 121, where it is held: "A railway company may, consistently with due process of law, be required by the State, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, the consequent cost to the company being, as a matter of law damnum absque injuria, are deemed to be compensated by the public benefit which the company is supposed to share" * * * "The necessity of the viaduct and the manner of its construction, were primarily vested in the discretion of the city authorities * * *."

In R. R. v. Minneapolis, 115 Minn. 460, Ann. Cas. 1912-D 1029, [fol. 76] the Court says: "The general rule so established is that where the safety, convenience or welfare of the public require that a railway company carry its tracks over a public way, or the public way over its tracks, by a bridge, the uncompensated duty of providing such bridge devolves upon the railway company. The basis of this rule is the superior nature of the public right inherent in the reserved police power of the State. A railroad though constructed first in time, is constructed subject to the implied right of the State to lay out and open new highways crossing its right of way. If the operation of the railway upon a particular surface or with a particular form of support for its tracks interferes with the public safety, convenience or welfare in the exercise of the public right to the use of such highway, then upon the railway company is placed the burden of making such necessary and reasonable adjustment of its tracks as will permit the exercise of the superior public right."

The Supreme Court of the United States in affirming R. R. v. Goldsboro, 232 U. S. 430, says: "It is well settled that railroad corporations may be required at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

In the recent case of R. R. v. Utility Commrs., 254 U. S. 394, Mr. Justice Holmes, speaking for the Court says: "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the State, in care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put in the same proposition in another form, the authority of the railroad to project their moving

[fol. 77] masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

As held in Superior v. Roemer, 154 Wis., 250, a railroad company is bound by the rules of common law to build, at its own expense, a viaduct necessitated by the construction of its railroad across an existing highway, and a city in the authorized exercise of the police power, may require a railroad company to construct the necessary viaduct; "Whenever it is reasonably necessary for the convenience and safety of the travelling public, it is the duty of a railroad company to viaduct or bridge its tracks at their intersection with streets. This duty exists at common law." St. v. R. R. Co. 122 Minn. 280.

In R. R. v. Railroad Commission, 176 Ind. 428, which was a suit to compel the railroad company to separate a grade crossing by constructing the highway under the grade of the railroad, the Court said: "It is well settled in this State that the right of a railroad company to cross a highway with its tracks carries with it the duty on the part of the company to restore the highway to, and keep it in, its former condition of usefulness and safety, and if this cannot be done by a grade crossing, the company must do it either by constructing its tracks over or under the highway, or the highway over or under its tracks."

In R. R. v. State, 158 Ind. 189, the Court held that when a grade crossing as constructed by a railroad company is dangerous to life and property, and interferes with the free use of the highway, the railroad company may be compelled to construct a crossing under the railroad, if that is necessary to afford security to life and property [fol. 78] and to place the highway in such condition as not unnecessarily to impair its usefulness, or interfere with the free use thereof, as required by law.

In R. R. v. Hopkins County, 153 Ky. 718, the Court held that a railroad company may be required to carry its own tracks over a highway by means of a bridge and that this rule applied to all cases where public safety, convenience or public welfare required such bridge.

In Denver v. R. R., 20 Colo. 186, it was conceded that a state or duly authorized municipality, has power to compel a railroad company to construct a viaduct along a street over its tracks, provided there is reasonable public necessity therefor.

In People v. R. R., 149 N. Y. Supp. 315, the Court says: "That the State has a right to compel a railroad company at its own expense to eliminate crossings at grade by a depression of its tracks and

the erection of bridges to carry streets over its right of way is too well recognized to admit of discussion."

The State in the exercise of the police power, may authorize a city to require a railroad company to construct at its own expense such viaducts over its tracks at street crossings as may be necessary for the safety and protection of the public. Omaha v. R. R. 94 Neb. 556.

In Chattanooga v. R. R., 128 Tenn. 399, the Court held that under the common law a city could require a railroad to construct and maintain at its expense a proper bridge at a street crossing over its tracks and stated that it was so held in 1859 in R. R. v. State, 3 Head (Tenn.) 523, and in Dyer Co. v. R. R., 87 Tenn. 712.

The defendants having failed to comply with the terms of the ordinance, mandamus was the proper remedy to pursue. "Where it is the duty of a railroad company to construct a viaduct or bridge over its tracks, it may be compelled to do so by mandamus. This duty may exist and be enforced by mandamus even though there is no express provision in the charter or statute, in regard to the erection of viaducts or bridges. It may arise out of, or be embraced in the duty to restore and keep the highway in repair. Thus in a leading case, it appeared that the railroad company's charter empowered the [fol. 79] company to lay its tracks across any public highway or street, in such condition or state of repair, as not to impair or interfere with its free and proper use. It was held that this was a continuing duty, and although the crossing might have been adequate when constructed, yet by reason of the increase of business of the railroad, or of travel upon the street, the crossing became dangerous, or obstructed such travel, the company was bound to provide some other mode of crossing; and as it appeared that the only safe and convenient mode was to carry the street by viaduct under the tracks it was further held that the mandamus would lie to compel the railroad to construct such viaduct, including the abuttments and approaches as well as the bridge for the tracks". Elliott on Railroads, Vol. 3, Sec. 1111.

Appellants contend that the ordinance is void for that compliance with same would not be that efficient and economical management and a reasonable expenditure for structures by the carriers as required by sub-division 2, section 15a of the Interstate Commerce Act as amended by the Transportation Act. But nothing in the Interstate Commerce Act or the Transportation Act contravenes the right of the State to invoke the supreme law—an inherent right—to legislate in the interest of public safety.

In Glenn v. Express Co., 170 N. C., 293, Justice Allen quotes from Sherlock v. Alling, 93 U. S. 99, approved in Plumly v. Mass., 155 U. S. 473, as follows: "In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country". Continuing, Justice Allen said: "The police power is one originally and always belonging to the States, and was not surrendered by them to the General Government."

As Justice Holmes said in R. R. v. Commrs., 254 U. S. 410: "To engage in interstate commerce the railroad must get on the land; and, to get on to it, must comply with the conditions imposed by the State for the safety of its citizens."

Affirmed.

[fol. 80] NORTH CAROLINA SUPREME COURT, SPRING TERM, 1923

No. 331. Durham County

[Title omitted]

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court of Durham County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed. And it is considered and adjudged further, that the defendants and sureties do pay the costs of the appeal in this Court incurred, to-wit, the sum of Forty 75/100 dollars ($40.75), and execution issue therefor.

[fol. 81] SUPREME COURT OF NORTH CAROLINA

CLERK'S CERTIFICATE

I, Edward C. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the proceedings in this Court in a cause entitled, City of Durham vs. Southern Railway Company, Norfolk & Western Railway Co., and Seaboard Air Line Railway Co.

Witness my hand and seal of said Court at office in Raleigh this 15 May, 1923.

Edward C. Seawell, Clerk of the Supreme Court of North Carolina. [Seal of the Supreme Court of the State of North Carolina.]

Endorsed on cover: File No. 29,642. North Carolina Supreme Court. Term No. 339. Southern Railway Company, Norfolk & Western Railway Company, and Seaboard Air Line Railway Company, plaintiffs in error, vs. The City of Durham, North Carolina. Filed May 23rd, 1923. File No. 29,642.

Map in back of vol. in pocket.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

Office Supreme Court
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WM. R. STANS
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NO. [redacted]71

SOUTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, Appellants,

vs.

CITY OF DURHAM, Appellee.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF ON BEHALF OF APPELLANTS.

W. B. GUTHRIE,
THEODORE W. REATH,
Of Counsel for Norfolk and Western Railway Company, Appellant.

FULLER & FULLER,
JAMES F. WRIGHT,
Of Counsel for Seaboard Air Line Railway Company, Appellant.

MANLY, HENDREN & WOMBLE,
L. E. JEFFRIES,
Of Counsel for Southern Railway Company, Appellant.

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In the Supreme Court of the United States.

No. 339 of October Term, 1923.

Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, Appellants,

vs.

City of Durham, Appellee.

In Error to the Supreme Court of North Carolina.

BRIEF ON BEHALF OF THE APPELLANTS.

I.

STATEMENT OF FACTS.

This proceeding was instituted in the Superior Court of Durham County, North Carolina, by the City of Durham for a mandamus to enforce an

ordinance requiring the three railroad companies to eliminate the grade crossing of Chapel Hill Street over the tracks of the railways in the City of Durham, North Carolina, by constructing an under-pass, below the tracks, for the highway. The three defendants are steam railroad systems engaged in interstate commerce. The tracks crossing Chapel Hill Street are part of their interstate railroad systems. The Norfolk and Western Railway Company filed an answer making the defense that an overhead bridge would be the appropriate remedy and that "before the ordinance was passed" (Transcript, page 28), that Company submitted plans and detailed specifications (Exhibit 1, Blueprint numbered 10769 c with Answer N. & W. Ry., following Transcript, page 54) and "made proposal of a plan for an overhead structure which would have carried the highway over the tracks of the three railways." The Southern and Seaboard in their answers make specific denials of evidentiary fact set forth in the complaint and set up that an overhead bridge would be an equally effectual solution of the problem of grade separation with the proposed under-pass and would not be wasteful and uneconomic. The first cost of the overhead structure would be, as disclosed by the answers, $160,000.00 as contrasted with $258,800.00 for the under-pass. Circumstances of fact are also detailed in the

answers showing the other advantages of convenience and safety which the overhead structure would have had as contrasted with the under-pass required by the ordinance.

In addition to other defenses the answers raise by specific averment these three Federal defenses:

First.—The ordinance in requiring the construction of an under-pass is arbitrary and unreasonable and not due process of law required by the Fourteenth Amendment of the Constitution of the United States;

Second.—The ordinance is an unreasonable imposition and restraint upon interstate commerce inhibited by Article 1, Section 8, paragraph 3, of the Constitution of the United States;

Third.—The ordinance in requiring an under-pass is void for that compliance therewith will not be efficient and economical management and reasonable expenditure for structures required by sub-division 2, Section 15a, of the Act of Congress known as the Act to Regulate Commerce, which section was added to that Act by one of the amendments of the Transportation Act of 28 February, 1920.

The Superior Court held as matter of law that the answers raised no issues of fact and if true,

did not state defenses. A trial on the issues of fact was denied.

A writ of alternative mandamus was awarded to the City and on appeal of the Railways to the Supreme Court of North Carolina the judgment was affirmed. From this final judgment of the Supreme Court of North Carolina a writ of error was allowed to the Supreme Court of the United States.

II.

ASSIGNMENT OF ERRORS.

First.—The North Carolina Supreme Court erred in affirming the judgment of the Superior Court of Durham County, North Carolina, entered September 16, 1922, which had upheld the ordinance of the City of Durham of the 20th of March, 1922, granting mandamus to compel these Petitioners to construct and maintain an underpass across their tracks at Chapel Hill Street crossing in the City of Durham, North Carolina.

Second.—The North Carolina Supreme Court erred in holding by its judgment of April 4, 1923, as a matter of law and without evidence, that the facts set up in the answers of the three Petitioners did not constitute a defense by the averments that the under-pass required by the ordinance was an unreasonable requirement so op-

pressive and arbitrary as to deprive defendants of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Third.—The North Carolina Supreme Court erred in holding that the said ordinance of the City of Durham upheld by the judgment of the Superior Court was not, under the facts set up in the answers of petitioners, arbitrary and unreasonable as a restraint upon interstate commerce inhibited by Article I, Section 8, paragraph 3 of the Constitution of the United States.

Fourth.—The North Carolina Supreme Court erred in holding by its judgment of April 4, 1923, as a matter of law and without evidence, that the following facts set up in the answers of the three petitioners, viz., that proposal was made to afford the relief by the construction of an overhead structure at a cost of approximately one hundred thousand dollars less than the cost of the underpass required by the ordinance and that the overhead structure would cause the minimum property damage and eliminate serious drainage difficulties and would provide a safer highway than the viaduct directed to be constructed by the said ordinance,—did not constitute a defense to the requirement of an under-

pass by the ordinance of the City of Durham, in that compliance with said ordinance was unreasonable and not efficient, economical management and not such a reasonable expenditure as required by Section 15a, sub-division 2 of the Act of Congress known as the Act to Regulate Commerce, as amended by the Transportation Act of February 28, 1920.

Fifth.—The Supreme Court of North Carolina erred in holding that no "issue of fact" was raised by the averments in the answer of petitioners that the action of the City of Durham in passing the ordinance was arbitrary, unreasonable, and oppressive, in that a bridge offered to be constructed affording relief from the danger could be constructed for the sum of one hundred thousand dollars less than the under-pass and that said proposed overhead bridge would be safer, avoid drainage difficulties, and do less property damage; and by this holding the Supreme Court of North Carolina deprived defendants of the defense plead that said ordinance was so arbitrary, unreasonable, and oppressive as to deprive it of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Sixth.—The North Carolina Supreme Court erred in declining to hold, as contended for by

the petitioners, that the ordinance is void for that compliance with the same would not be that efficient and economical management and reasonable expenditure for structures by the carriers as required by sub-division 2, Section 15a, of the Interstate Commerce Act, as amended by the Transportation Act, and holding that nothing in the Transportation Act contravened the right of the State to legislate in the interest of public safety under the facts shown in the pleadings herein and in the manner set forth in the said ordinance of the City of Durham.

Seventh.—The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that an overhead bridge would have been reasonable and that the said under-pass was unreasonable in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, paragraph 3.

Eighth.—The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings"

that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that the under-pass was inefficient and uneconomic management and an unreasonable expenditure for structures in violation of Section 15a, subdivision 2, of the Act of Congress known as the Act to Regulate Commerce.

Ninth.—The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that the under-pass was arbitrary and unreasonable and not due process of law required by the Fourteenth Amendment of the Constitution of the United States.

III

ARGUMENT.

The nine assignments of error raise three Federal questions which we shall group and present under three heads:—

1. The Ordinance is arbitrary and not due process of law required by the Fourteenth Amendment of the Constitution of the United States.

The Superior Court and on error the Supreme Court of North Carolina in refusing a jury trial and granting a mandamus held that taken as true the answers raised no issues of fact and stated no defense. A motion was made by the Railways and denied by the trial Court to transfer the case to the civil docket for trial by jury. The Supreme Court of North Carolina affirmed the denial of this motion, holding that no issue of fact was tendered by the answers "because they qualified their admission of the truth of the averment in paragraph 4 as to the volume of the traffic over this grade crossing," thus disregarding the three federal issues tendered by the answers. The Railways did not assert from the Federal viewpoint (leaving out of consideration for the moment the contention that the Transportation Act had prescribed the rule to be followed in making such expenditures) that the council of the City of Durham lacked power to pass an ordinance *reasonably* calculated to promote public safety by requiring the separation of grades at a dangerous crossing: Erie Railroad *vs.* Public Utility Commissioners, 254 U. S. 394. Nor are we urging under this head that mere expense

is the limit of the police power. The point we do make under this first head is that, taking the answers as true, the under-pass required by the ordinance is *unreasonable* and not that due process of law imposed upon every exercise of State authority by the Fourteenth Amendment of the Federal Constitution. Suppose the ordinance had required a marble structure unrelated to any useful purpose? The difference between this extravagant illustration and the thing which has been done is a matter of degree only. The Fourteenth Amendment was contrived to prevent such arbitrary action.

In Missouri Pacific Ry. Co. *vs.* Nebraska, 217 U. S. 196, the Court considered a Nebraska Statute which required railroads to construct side-tracks or switches to reach grain elevators erected adjacent to the right of way. In holding the Statute void as taking the property of the Railway Company without due process of law, the Court said that if the statute (page 207)

> "requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act."

In Washington, *ex rel,* Oregon Railroad & Navigation Company *vs.* Fairchild *et al.,* Commissioners, 224 U. S. 510, a Railroad Commission, after hearing, had ordered a switch connec-

tion to be constructed between two trunk lines of railroad. There was no evidence that business was offering which would justify the track. In holding the Commission's order invalid the Court thus set the mark of the kind of hearing which must be had in order to satisfy the requirement of due process (page 525):—

> "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

A constitutional hearing was denied in the case at bar.

A case interposing the due process clause as a defense to a municipal ordinance requiring the lowering of railway tracks to avoid grade crossings is C. M. & St. P. Ry. Co. *vs.* Minneapolis, 238 Fed. 384 (District Court, Minnesota, August 15, 1916). There, an ordinance required the Railway Company to depress its tracks in order to avoid crossing streets at grade. In a suit to restrain the enforcement of the ordinance, the Court held the evidence (Syl. 8, page 385)

> "to show that the provision, requiring the depression of the tracks a second time after

> they had reached the natural level at the railroad yards, in order to pass under one street, was unnecessary, unreasonable, and arbitrary to such an extent as to deprive the railroad company and an industrial plant having trackage connections therewith of their property without due process of law."

The Court added that such an ordinance is always open to this inquiry (page 399):—

> "Is it unnecessary or unreasonable or arbitrary to such an extent that it can fairly be said that its enforcement will have the effect of depriving the complaining parties of their property without due process of law?"

An illustrative state case is State *ex rel* City of Indianapolis *vs.* Indianapolis Union Ry. Co., 160 Indiana 45 (1903), 66 N. E. 163. The Railway filed a demurrer to an alternative writ of mandamus. The City had passed an ordinance declaring all grade crossings within the city limits nuisances, requiring their abatement to secure the safety of citizens and requiring the railroads to separate the grades and raise or lower their tracks to conform to any grade that might be established. The Court held that the power of the City to pass such an ordinance did not extend to a requirement that all the railroads within the corporate limits should construct elevated

tracks over all crossings without regard to the conditions or circumstances of any particular crossing. The lower Court had sustained the demurrer to the prayer for the writ of alternative mandamus and in affirming this decision the Supreme Court said (page 168):—

> "The power of relator may be conceded, arguendo, either under its charter law or under clause 5 of section 5153, Burns' Rev. St., *supra,* where any particular railroad crossing over its public streets by reason of the peculiar or particular circumstances or conditions thereof can only be made safe for public travel thereover by elevating the tracks of the road, to compel the railroad company to discharge such duty or obligation. But certainly such authority under the existing laws cannot be extended by construction so as to warrant the relator in coercing appellee to construct and maintain a system of elevated tracks for all of its various roads running into and through the city of Indianapolis. The ultimatum presented to appellee by the ordinance in question was to remove the surface tracks of its roads and construct and maintain elevated tracks over all of the crossings in the prescribed district, without regard to the conditions or circumstances of any particular crossing."

So the Court decided that the fiat of City Councils that all grade crossings were nuisances

could not substitute a showing of the facts as to each crossing, the hazard, use of the highway, etc. Hence the ordinance was declared arbitrary and void.

The principle applied by the Indiana Supreme Court is applicable to the case at bar because the facts stated in the answers and admitted by the judgment of the Superior Court refusing trial and granting the writ affirmatively disclose that the under-pass for the highway ordered in the City ordinance of Durham was wasteful in point of expenditure, not effective on account of bad drainage and less safe and convenient than the overhead bridge.

Another State case strikingly illustrates the error committed by the North Carolina courts in the case at bar in giving conclusive weight to the ordinance against the better way set forth in the answer of the railroads. The case is City of Owatonna *vs.* Chicago, Rock Island and Pac. Ry. Co. (Minn., Oct. 19, 1923), 195 N. W. 452. There the city sued out an alternative writ of mandamus, requiring defendant railway to install crossing gates where its tracks crossed two streets of the city at grade and provide operators at all times to attend to and operate these gates. The answer of the Railway asserted

> "that the ordinance is arbitrary, oppressive and unreasonable, especially that portion of

> it requiring defendant to provide operators at all times to attend to and operate the gates, and that compelling defendant to install such gates and provide such operators will deprive it of its property without due process of law."

In answer the Railway further

> "offered to install electric flash light signals at these crossings and keep them in operation both day and night, or to maintain flagmen at such crossings at all reasonable hours. It alleged that experience had demonstrated that such signals were more effective than gates in preventing accidents, and that they could be installed, maintained and operated for a small part of the expense of installing, maintaining and operating gates."

These averments in the answer were stricken out by the trial Court and on error to the Supreme Court of Minnesota this judgment was reversed. The Supreme Court said:—

> "Defendant should be permitted to prove, if it can, that the safety devices which it offered to provide are more efficient than gates in protecting the traveling public; that safety devices equally as effective as gates can be provided and maintained at much less expense."

In Mississippi Railroad Commission *vs.* Mobile & Ohio Railroad Company, 244 U. S. 388,

the Commission had made orders requiring the railroad company to restore to service six passenger trains that had been suspended, two each way daily between Meridian and Waynesboro and one each way daily between Meridian and Okolona, these towns being in the State of Mississippi. The trains between Meridian and Okolona were interstate and the others local. At the time of the discontinuance of certain of the trains, other trains previously faster had been changed so as to stop more frequently. In holding these six orders of the Commission void as not due process of law the Court said (pages 395-6):—

> "Thus summarized this evidence shows that the plaintiff railroad company, an important interstate carrier, was operating before the business depression incident to the war on a margin so narrow that the $85,000 of profit for the entire preceding year would have been more than swallowed up in nine days by the shrinkage of business of the company as it was when this controversy arose; that without being able to meet its growing deficit the company had resorted to rigid economies of every sort before it discontinued these six trains the continued operation of which would have involved a loss of $10,000 a month; that the three daily trains each way to the north of Meridian which remained after the taking off of the trains which gave

rise to the controversy cannot be said to be inadequate to the needs of the comparatively small population to be served, and that while the service to the south of Meridian—with but two trains each way in twenty-four hours, and these running at hours inconvenient for the transaction of business—cannot be thought a liberal service, yet these orders were intended by the commission to be in effect one order for the restoration of the six trains, they were thus treated in the court below and must be so treated here. Looking to the extent and productiveness of the business of the company as a whole, the small traveling population to be served, the character and large expense of the service required by this order, and to the serious financial conditions confronting the carrier, with the public loss and inconvenience which its financial failure would entail, we fully agree with the District Court in concluding that the order of the commission at the time and under the circumstances when it was issued was arbitrary and unreasonable and in excess of the lawful powers of the commission, and that if enforced it would result in such depriving of the railroad company of its property without due process of law as is forbidden by the Fourteenth Amendment to the Constitution of the United States."

The answers set out the facts in detail showing that the requirement of the underpass was

burdensome, arbitrary, unsafe, inconvenient, unduly expensive and unreasonable. There is no denial in the record of the facts set forth. Indeed, the lower Court, as shown, found the facts "from pleadings." All the facts that were before the lower Court or the Supreme Court are also before this Court. So the statement in the opinion of the Supreme Court of North Carolina (Transcript, page 49) that "the judge was ready to hear and determine the action but the railroads failed to offer testimony or evidence of any kind whatever" must be understood to refer only to the degree or amount of travel and hazard at the crossing. If stretched beyond this it becomes a gratuitous, incorrect statement of the action of the lower court on the Federal issues in finding the facts from the pleadings. The lower court from the pleadings decided as matter of law that the answers stated no defense.

The principle which seems controlling upon this procedural phase of the case was thus expressed by the Court in Davis *vs.* Wechsler, 263 U. S. 22:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the

venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defence on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward* vs. *Love County*, 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* vs. *Grand Lodge Knights of Pythias*, 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

Is it not an arbitrary exercise of power to compel these defendants to build an underpass at a

cost of $100,000.00 more than the overhead structure when the pleadings establish without contradiction that the overhead bridge will cause the minimum property damage, will furnish a less grade on the approach, will eliminate drainage difficulties which make the underpass objectionable and inherently improper, will enable the Railway Companies to use to the maximum their property by providing for seven tracks which cannot be obtained by an underpass, when the steel girders necessary for the underpass are dangerous to trainmen, and the underpass will necessitate the elevation at great expense of the tracks of one of the defendants and will seriously interfere with the economical performance of switching service? Add to all of these facts set up in the answers and admitted for the purposes of this case, the further fact that an overhead structure will provide "a safer highway on a viaduct" (Tr., p. 29) and we submit that the Court should have concluded that this was an arbitrary exaction.

Perhaps the Supreme Court of North Carolina intends sub-division 7 of the opinion of that Court (117 S. E. 22) as an answer to the defense of lack of due process. In sub-division 7 the Court asserts that "the State in the exercise of the police power may authorize a city to require a railroad company to construct at its own expense such viaducts over its tracks at street cross-

ings as may be necessary for the safety and protection of the public." No one at this day will deny that police power is as thus set forth. But the issue tendered by the answers in this case was whether the power had been exercised reasonably or "was arbitrary and unreasonable," to use the phrase of the Supreme Court of the United States in the Mississippi Railroad Commission case, *supra*. The Supreme Court of North Carolina seems to be asserting that the conceded power of the City to order grades separated is not subject to the limitation of the Fourteenth Amendment.

The clearest way to disclose the confusion of mind and resulting error of the Supreme Court of North Carolina will be by bringing into juxtaposition statements from our opponent's brief in that court with the kindred parts of the Supreme Court's opinion. The brief said at page 5:—

> "The defendants further assert that because they deny that the underpass is an economical way of eliminating the grade crossing, because they assert that the underpass is more expensive than a bridge, that, therefore, the action of the governing authorities of the City of Durham was arbitrary, unreasonable and oppressive. The plaintiff petitioner contends that these defenses raise no issues of fact to be determined and tried by a jury."

and on page 6:—

> "The question whether or not the public safety demanded the elimination of the grade crossing of the street and the railroads was one within the legislative power of the governing authorities of the City of Durham. Their determination of this question is not the subject of review by the Courts. Their decision is conclusive and final upon this question unless it is clearly oppressive and amounts to an abuse of their discretion, that is, is not done in good faith."

And the Supreme Court of North Carolina adopted this view and held that the question of "fraud" and "oppression" was one of law for the Court, saying, (117 S. E. 20):—

> "That the governing body exceeded its powers, or committed fraud and oppression, constituting a manifest abuse of discretion, are questions of law for the court. The burden is upon the defendants to show affirmatively that there was an abuse of discretion and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the court.

So the validity of the ordinance was made to turn on "good faith," "fraud," etc., as matter of law, instead of solely on the unreasonable or

arbitrary nature and effect of the enactment upon the facts in the uncontradicted answers. In short the North Carolina Courts put the validity of the ordinance upon fraud, and the like issues, and did not pass upon the real Federal issues of reasonableness and the like.

From another viewpoint there was no hearing required by due process of law in the Superior or Supreme Court of North Carolina. The opinion of the Supreme Court (Transcript, page 48) states that "the assertion in the answer that the underpass would be more expensive than a bridge" presented "a question *of fact* for the court" (italics ours). On the very next page the opinion states that "the reasonableness of a city ordinance is a question *of law* for the court" (italics ours). How could there be a hearing in view of these contradictory statements, first that one of the important Federal defenses was an issue of fact and later that the issue was one of law? The Superior or Trial Court determined from the pleadings that no defense was stated and granted a writ of mandamus: and the Supreme Court of North Carolina affirmed this judgment in an opinion which, as to one of the important Federal defenses of wasteful expenditure, showed by conflict of statement no understanding consideration of the defense. The truth

is that both courts considered the ordinance conclusive as matter of law and without hearing the evidence even though the evidence might fully establish all the facts set forth in the answers. Here we have a shutting of the mind to the facts and the resultant Federal questions.

This Court recently in Ohio Valley Water Company *vs.* Ben Avon Borough, 253 U. S. 287, considered an order made by the Public Service Commission of Pennsylvania fixing the value of a water company's plant and the revision of this order by the Superior Court of Pennsylvania (an intermediate tribunal) raising the value found by the Commission of $924,744.00 to $1,324,621.80 and authorizing rates sufficient to yield 7 per cent. upon this value as raised. The decision of the Superior Court had been reviewed by the Supreme Court of Pennsylvania, and that Court, after stating that the appeal "involved the question of the fair value, for rate-making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect," and after noting that the Superior Court had differed from the Commission as to the proper valuation of the property, then ruled that:—

> "A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the

question of values, there was merely the substitution of the former's judgment for that of the commission, in determining that the order of the latter was unreasonable."

In reversing the Supreme Court of Pennsylvania for failing to accord a hearing such as the Fourteenth Amendment requires, this Court said at page 289:—

"Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal. * * *

"In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. * * *

"Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the Commission's order may be challenged because confiscatory. Thus

far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the State to provide."

2. The ordinance is void as in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, paragraph 3.

The defense that the ordinance upon the admitted facts stated in the answers constituted an interference with interstate commerce was made by the facts presented in the answers (Transcript, pages 22, 26, 30), and was argued at length in the Superior and Supreme Courts of North Carolina. The Supreme Court, however, (City of Durham *vs.* Southern Railway *et al,* 117 S. E. 17, April 4, 1923) did not in terms pass upon this question or make any expression from which the ground on which that Court overruled this defense can be understood. Accordingly we present here, as in the Supreme Court of North Carolina, our argument without any light from the Supreme Court of North Carolina as to its views on this point.

The States may regulate interstate carriers in respect of matters not essentially national or not already covered by regulation of Congress. Familiar instances of such state regulation will at once occur in the Sunday laws, the Car Stove law, the law requiring examination of enginemen

for color blindness, etc. But the regulation must be reasonable. An illustration of arbitrary regulation and illegal restraint, in a field wherein at the time the case was decided Congress had not acted and the State therefore could legislate, is Houston & Texas Central R. Co. *vs.* Mayes, 201 U. S. 321. The Court considered an Act of the State of Texas applying alike to interstate and intrastate shipments which penalized the failure by a railway company to furnish cars to shipper within a given number of days after requisition and admitted of no excuse except "strikes or other public calamity." The Court pointed out that exigencies of business, weather, or whatnot interfered with transportation and prevented the delivery of cars for loading on a particular day. Accordingly the Court held that the Texas Act was an unconstitutional regulation operating as a restraint upon interstate commerce and said (page 331):—

> "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance."

In Seaboard Air Line Ry. Co. *vs.* Blackwell, 244 U. S. 310, the blow-post law of Georgia requiring railroads to check the speed of trains before reaching public road crossings so as to stop in time if the highway was obstructed was held an interference with interstate commerce as applied to the state of facts specifically pleaded by the defendant interstate carrier in the case. On demurrer to the answer the averments were struck out for which judgment was reversed, the Court saying (page 315)

> "there might be" crossings "so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains."

Upon the conceded facts this regulation in the case at bar will entail an expenditure for the under-pass of $258,800.00 for the execution of a plan of separating the grades, less safe and desirable from the view-point of the public and the railways than the overhead bridge which would cost $160,000.00.

The cases holding that State Statutes and Commission orders requiring interstate trains to stop at local stations constitute an illegal interference with interstate commerce are also suggestive of the ruling the Supreme Court would make in this

case: Herndon *vs.* C. R. I. & P. R. Co., 218 U. S. 135; C. B. & Q. R. Co. *vs.* Railroad Commission of Wisconsin, 237 U. S. 220; St. Louis & San Francisco Ry. Co. *vs.* Public Service Commission of Missouri, 254 U. S. 535.

In the last case above cited, the Court said:—

> "The applicable general doctrine has been often considered and in Chicago, Burlington & Quincy R. R. Co. *vs.* Wisconsin Railroad Commission, 237 U. S. 220, 226, this Court said:
>
> " 'In reviewing the decision we may start with certain principles as established: (1) It is competent for a State to require adequate local facilities, even to the stoppage of interstate trains or the re-arrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement. Gladson *vs.* Minnesota, 166

U. S. 427; Lake Shore R. R. *vs.* Ohio, 173 U. S. 285; Atlantic Coast Line *vs.* Nor. Car. Corp. Comm., 206 U. S. 1; Mo. Pac. Ry. *vs.* Kansas, 216 U. S. 262; Cleveland, etc., Ry. *vs.* Illinois, 177 U. S. 514; Mississippi R. R. Comm. *vs.* Ill. Cent. R. R., 203 U. S. 335; Atlantic Coast Line *vs.* Wharton, 207 U. S. 328.' "

Are not the same limitations on the police power applicable in this case? All that the State or the City is entitled to require is that the local conditions be adequately met. Once they are adequately met, anything which requires an added expenditure of money becomes an improper burden on the interstate carrier.

The case at bar is not different in principal from Kansas City Southern Ry. Co. *vs.* Kaw Valley Drainage District, 233 U. S. 75, wherein petitions for mandamus were filed by the Drainage District, against two railways to require compliance with an order of the Drainage District upon the railways requiring them to raise their bridges over the Kansas river "to specified heights and to remove the old" bridges, which the railroads had refused to do, claiming that the order was an unreasonable restraint on interstate commerce. The Court after pointing out that the existing bridges were a necessary part of lines of commerce by rail among the States and were subject to the exclusive

control of Congress, used this significant language (page 79):—

> "The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' Illinois C. R. Co. *vs.* Illinois, 163 U. S. 142, 154, 41 L. ed. 107, 111, 16 Sup. Ct. Rep. 1096; Austin *vs.* Tennessee, 179 U. S. 343, 349, 45 L. ed. 224, 228, 21 Sup. Ct. Rep. 132; Atlantic Coast Line R. Co. *vs.* Wharton, 207 U. S. 328, 334, 57 L. ed. 230, 234, 28 Sup. Ct. Rep. 121."

3. The ordinance is void for that compliance would not be efficient and economical management and reasonable expenditure for structures by the carrier as required by sub-division 2, Section 15a, of the Interstate Commerce Act as amended by the Transportation Act.

With this defense, that the under-pass would not comply with the Transportation Act, the Supreme Court of North Carolina deals in two different parts of the opinion. The first allusion

(117 S. E. 19) states that "the assertion in the answer that the underpass would be more expensive than a bridge, and therefore that the action of the governing authorities of the city of Durham was arbitrary, unreasonable, and oppressive," raised no issues of fact to be tried by a jury and "was a question of fact for the court." Later in sub-division 9 of the opinion (117 S. E. 22) the Supreme Court of North Carolina asserts that "nothing in the Interstate Commerce Act or the Transportation Act contravenes the right of the state to invoke the supreme law—an inherent right—to legislate in the interest of public safety."

Here appears the assertion that the police power of the State is not subject to the exercise by Congress of the commerce power. But the police power cannot be exercised arbitrarily. And Congress having under the commerce power in the Transportation Act declared that expenditures for structures shall be reasonable, Congress has thus stated a rule defining reasonableness which the States may not contravene in respect of the structures required of interstate carriers. On the facts appearing in the pleadings the expenditure required is extravagant and wasteful and hence in violation of the Transportation Act.

In several of the amendments added by the Transportation Act to the Interstate Commerce

Act Congress has entered a field in the regulation of interstate carriers and commerce previously left to state regulation. Section 15a of the Commerce Act as to carrier rates is a part of this new plan of regulation. The part of that section which operates in the case at bar is as follows:—

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." (February 28, 1920.)

Here for the first time the Commission was directed to prescribe a system of rates which would, as nearly as may be, earn an aggregate annual net railway operating income equal to a fair return on the property, and the allowance of these rates was conditioned upon "efficient and economical management and reasonable expenditure for maintenance of way, structures and equipment" by the carrier. Responding

to this new obligation the Interstate Commerce Commission in *Ex Parte* 74, 58 I. C. C. 220, advanced and later, 68 I. C. C. 676, reduced the rates. So we have presented a new situation which did not exist when the Erie case (254 U. S. 394) was under consideration. This situation is new in the essential circumstance that Congress has, in making the rates of the interstate carriers, conditioned the rate system upon efficient and economical management in such matters as this present one. This section of the Statute was foreshadowed in the report of the Committee on Interstate Commerce to the Senate wherein Senator Cummins made the following statement:

> "Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce * * * that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities."
>
> (Report No. 304 of Committee on Interstate Commerce to accompany S. 3288 dated Nov. 10, 1919, page 12, (Calendar No. 231) "Government Control of Railroads.")

And a fair return upon the carriers' property as a whole or in rate groups provided for in subdivision 3 of Section 15a is conditioned upon "economical management of existing transportation facilities" which excludes a wasteful expenditure, part capital and part extraordinary operating expense, such as this under-pass.

The recapture provisions (sub-divisions 5 and 6 of Section 15a), the provisions requiring the approval of the Commission for security issues (Section 20a), the accounting provisions (subdivision 5, Section 20) and other provisions of the Interstate Commerce Act present a comprehensive and exclusive plan of financial administration and expenditure by the carriers, the purpose of Congress being, as we shall presently endeavor to show, to furnish and support a nation-wide and adequate system of transportation for the public.

According to the facts stated in the answers, and admitted as true upon this record the underpass structure required by the ordinance would be inefficient and wasteful.

The Supreme Court in the Wisconsin Rate Case (Railroad Commission of Wisconsin *vs.* C. B. & Q. R. Co., 257 U. S. 563) ruled that the Interstate Commerce Commission had power to raise intrastate rates in order to prevent discrimination against interstate commerce and consequent burden upon that commerce. The Court in decid-

ing the case made use of this language which is apposite in principal to the present case (page 585):—

> "It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill."

In Interstate Commerce Commission *vs.* Goodrich Transit Company, 224 U. S. 194, the accounting provisions of the Interstate Commerce Act were under consideration which required the carriers to use a uniform system of bookkeeping and account for all their expenditures and revenues. The question arose whether Congress had

the power to authorize the Interstate Commerce Commission to require accounting of an intrastate activity of the carrier—the expense of conducting an amusement park by one of the Great Lakes Lines. The Court held that Congress had the power to require the whole accounting to be made for the enlightenment of the Interstate Commerce Commission.

And in the New England Divisions Case (A. C. & Y. Ry. *vs.* United States, 261 U. S. 184), the Court reaffirmed from the angle of financing the carrier system of the country the principles announced in the Wisconsin Rate case, *supra,* and pointed out that the Transportation Act introduced a new railroad policy in Federal legislation, namely, "to ensure, * * * adequate transportation service". The Court approved a shift by the Interstate Commerce Commission of divisions between the trunk lines and the New England roads to benefit and support the latter roads financially. The analogy with this case of limiting "to reasonable expenditures for maintenance of way, structures and equipment" (sub-division 2 of Section 15a of the Interstate Commerce Act as amended by the Transportation Act) is apparent.

The Recapture decision is recent: Dayton-Goose Creek Ry. *vs.* I. C. C., Jan. 7, 1924.

So that at this day no serious doubt can be entertained of the power of and exercised by Con-

gress to make this requirement of efficient and economical expenditures by the carriers. As clear at this time is the adequacy of the power of Congress to deal with all the expenditures of the carriers.

In order to maintain an adequate railway service for the public, Congress has authorized reasonable rates and required reasonable expenditure by the carriers for maintenance of way, structures and equipment. The under-pass required by the Durham ordinance is wasteful and inefficient. The ordinance upon the record made by the undenied answers in the case at bar requires unreasonable expenditures inhibited by the Act of Congress.

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vs.

City of Durham, *Appellee*.

In Error to the Supreme Court of North Carolina.

REPLY BRIEF OF THE APPELLANTS.

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The brief of the Defendant in Error has raised but one question to which we deem reply necessary.

The argument for the City of Durham (Appellee's Brief, pp. 12-15) is that the controlling question is one of State law, of interpretation of section 868, North Carolina Consolidated Statutes, which prescribes procedure on mandamus. The State Supreme Court quoted section 868 (Trans., p. 48), as authorizing sum-

mons returnable before the Judge in chambers "at which time the court, except for good cause shown, should hear and determine the action both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court upon the motion of either party to continue the action until the issue of fact can be decided by jury at the next regular term of the court." Mentioning the qualified admissions of two of the railroads of the volume of the traffic over the grade crossing, the State Court correctly decided that no issue of fact was thereby raised, and continued: "Neither did the assertion in the answer that the underpass would be more expensive than a bridge and therefore that the action of the governing authorities of the city of Durham was arbitrary, unreasonable and oppressive. These defenses raised no issues of fact to be tried by jury and the latter was a question of fact for the court." Accordingly, our opponents argue that the State Court has determined, as a State question and beyond possibility of Federal review, that the assertion in the railroad answers of a better and more economical plan for grade separation raises no "issue of fact" with the complaint. Therefore, the argument goes, the railroads having neglected the opportunity to support with proof their side of the "question of fact" have waived their day in court.

This Court will note from the record that the petition of the City alleged a dangerous grade crossing and an ordinance requiring separation in a given method, by underpass. The answer of the railroads attacked the reasonableness of the ordinance by setting up a better and more economical method.

Quoting from the answer of the Southern Railway Company (Trans., p. 23):

> "In thus requiring the construction of an underpass with the proper approaches the ordinance is arbitrary and unreasonable," etc.

This answer and the answer of the other two railroads then proceeds to demonstrate that by an overhead crossing the same result could be best and most economically accomplished. (Trans., pp. 23, 24, 25.) In no other way could the unreasonableness of the ordinance be demonstrated. Only by comparison of methods could reasonableness be tested. By every suggested standard the method of the railroads was alleged to be better. An otherwise proper exercise of police power cannot be successfully attacked by mere showing of expense or operating inconvenience—in this we agree with our opponents. This was the status of the case when the court of first instance, "being of the opinion that no issue of fact for trial by jury is raised upon the pleadings" (Trans., p. 35) found as matter of fact "that said ordinance is valid and reasonable."

There is no dispute in this case over the proper definition of an "issue of fact." The State Supreme Court in this case said (Trans., p. 49):

> "There must be sufficient facts alleged to show that the ordinance is unreasonable and oppressive before it" (reasonableness) "can become an issue of fact for the jury."

This correct statement can be reconciled with the opinion of the State Court that the issue of reasonableness of the ordinance "was a question of fact for the court" only on the theory that the answers of the railroads did not traverse the reasonableness of the ordinance. The effect of the answers as raising issues

on which Federal rights depend is a Federal question. The State statute, section 868, is mandatory that issues of fact be tried by a jury. That court has deprived the railroads of opportunity to maintain their Federal rights by the erroneous opinion that an issue of fact framed in the pleadings is a "question of fact." To quote again the principle stated in Davis v. Wechsler, 263 U. S. 22:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 339

SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY, APPELLANTS,

vs.

CITY OF DURHAM, APPELLEE

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA

Brief of Appellee

I.

STATEMENT OF FACTS

This proceeding was brought in the Superior Court of Durham County, North Carolina, for a mandamus to compel the Railway Companies, Appellants, to eliminate a grade cross-

ing of their tracks with Chapel Hill Street in the City of Durham. The proceeding was made returnable before the Judge of the Superior Court on a certain day in accordance with the statute of the State. Chapel Hill Street is one of the main streets or thoroughfares located in said City, connecting the northern and southern portions of the City and leading from Durham to Chapel Hill—the seat of the University of the State; that the three railways, appellants, have tracks crossing at grade Chapel Hill Street, on which tracks are operated both passenger and freight trains, and switching engines and trains; that within a radius of 800 yards of the street crossing are located the freight depots of the railway companies, large tobacco plants and factories, ice and power plants, flour mills, hosiery mills, all of which are served with side or spur tracks connected with the main-line tracks of the railway companies and over which are constantly, during the day and night, operated passenger and freight trains and switching engines and cars or trains; that several accidents had occurred at this crossing, in which persons, animals and vehicles had been injured; that the City of Durham had caused to be made a record of the street traffic over and along said street at said grade crossing, which record is attached as exhibibits to the complaint or petition, showing that an average of nearly 4000 pedestrians and bicycles, more than 500 horse drawn vehicles, more than 2000 passenger automobiles, more than 350 delivery wagons, more than 100 heavy trucks and more than 200 street cars used the street at this crossing between five o'clock in the morning and eleven at night, and that between these hours traffic over the street was interrupted more than 100 times by trains and engines moving over the railway tracks; that the governing authorities of the City of Durham, finding that the continued maintenance of this grade crossing was a great inconvenience and an increasing menace to the public safety, that it seriously interrupted and impeded traffic along said street, employed an expert engineer to advise

the city if and how it were practicable and possible to eliminate said grade crossing and separate the street from the railways tracks; that said engineer recommended to the governing authorities that the grade crossing could be eliminated and that the best method was to pass the street under the railway tracks; that the City authorities invited the railway companies to meet with the representative of the City for a discussion of the matter and many conferences were held but no definite or satisfactory agreement could be reached, whereupon on March 20, 1922, the governing authorities of the City adopted the following Ordinance:

> "Whereas, the Greensboro and Goldsboro line of the Southern Railway crosses Chapel Hill Street at grade, near the center of the City of Durham, North Carolina, and,
>
> "Whereas, the right-of-way of said railway at that location is two hundred feet wide, the same being occupied by the tracks of the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, certain of which said tracks are sometimes used by equipment of other railway companies, tenants of said Southern Railway Company, which location is a part of the freight and switch yard of two of said railway companies, where the shifting of engines, cars and trains, both freight and passenger, is of constant practice during the hours of day and night, all of which is in addition to the movement of through freight and passenger trains over said tracks, and
>
> "Whereas, approximately 120 street cars, 260 heavy trucks, 170 delivery wagons, 788 passenger automobiles, 400 horse drawn vehicles with their passengers, drivers and operators, together with 3,600 pedestrians, including many school children, use said grade crossing daily between the hours of 7 o'clock A. M., and 7 o'clock P. M., and,

"Whereas, the City Council finds and so declares that the continued maintenance of said grade crossing is dangerous to life, limb and property, and that the safety, comfort, convenience and welfare of the public requires its elimination, and,

"Whereas, the City Council, after having opened negotiations with the officials of the said railway companies regarding the said grade crossing, did upon the suggestion of said railway officials, refer the matter to a joint body consisting of the City Manager, City Consulting Engineer, and the engineering representatives of the said Railway companies for the purpose of reaching an agreeable solution of the elimination of said grade crossing, and,

"Whereas, the Consulting Engineer of the City recommends the said grade crossing can best be eliminated by the building of an underpass, and has submitted plans covering same, and,

"Whereas, the railway engineers have submitted in addition to plan for an underpass, counter-plans for a bridge, and,

"Whereas, the City Council, after full and careful consideration, finds and so declares that an underpass instead of a bridge will better meet the needs, safety, convenience and welfare of the public, and that the same can be constructed for the same cost or less than the cost of a bridge, and,

"Whereas, the City Manager and Consulting Engineer report that they and the railroad engineers are substantially agreed upon a general plan for an underpass; be it therefore,

"ORDAINED BY THE CITY COUNCIL OF THE CITY OF DURHAM,

Section 1. That the grade crossing at Chapel Hill Street occupied and used by the Southern Railway Com-

pany, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, and occasionally by tenant roads of the said Southern Railway Company, is a menace to the public safety, is dangerous to life, limb and property, and the City Council finds and so declares that the safety, comfort and convenience and welfare of the public requires the elimination of said grade crossing by the construction of an underpass to take the place thereof.

Section 2. That the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, which said railway companies are now occupying and using tracks crossing the said Chapel Hill Street at grade, are hereby ordered and directed to eliminate said grade crossing by constructing an underpass with proper approaches in the place thereof.

Section 3. That the said underpass structure shall have a minimum overhead clearance of thirteen feet; that center supports, if used, must not be more than eighteen inches in thickness, the center line of which must be concentric with the center line of Chapel Hill Street, as established by the City Engineer; that the horizontal clearance between the center supports and the curb on each side shall not be less than twenty feet, that the sidewalks through said underpass shall not be less than six feet wide in the clear; that the abutment walls shall set flush with or back of the building lines as established by the City Engineer; that the finished surface of Chapel Hill Street at the apex of the crown shall not be lower than El. 383.5 as referred to the standard bench mark datum of the Engineering Department of the City of Durham; that solid non-leakable floors shall be provided in the super-structures, that the detail plans for said underpass shall be submitted to the City Engineer for his criticism and shall be approved by him before the beginning of construction work.

Section 4. That the active construction work on said underpass shall be started not later than sixty days from the adoption of this ordinance and same shall be completed within 280 working days thereafter.

Section 5. That this ordinance shall take effect from and after the 20th day of March, 1922."

That immediately after the adoption of this ordinance copies were served upon the railway companies. No attention was paid to it by the railway companies and they treated it with silent inaction. After the time fixed in the ordinance, the railways having taken no steps to obey, the City of Durham applied for a mandamus to enforce obedience to it. Upon the hearing of the application before the Superior Court Judge, he ruled that upon the pleadings no issue of fact for trial by jury was raised, and the railway companies offering no evidence before him, he found certain facts among them the following: "That the continued maintenance of said grade crossing is very dangerous to life, limb and property, is a menace to the public safety and detrimental to the comfort, convenience and welfare of the people; that the elimination of said grade crossing and the removal of this danger is necessary and required for the public safety of life, limb and property, and the comfort, convenience and welfare of the public and public safety requires and will be subserved and promoted by the construction of an underpass under said crossing with proper approaches thereto, all as is provided for in said ordinance above set out." Incorporated in and as a part of the judgment was the following: "The City of Durham agrees to do all underground work, such as the relaying and replacing of water, gas and sewerage mains, street paving including curbs and gutters and also side walks." The Railway Companies filed separate answers, but each contended that the ordinance of the City of Durham was (1) arbitrary, unreasonable and violated the constitutional rights of the railways as not due process of

law required by the Fourteenth Amendment of the Constitution of the United States; (2) was an unreasonable imposition and restraint upon interstate commerce, in which commerce all the railway companies were engaged and used tracks crossing Chapel Hill Street, and was in controvention of Article 1, Section 8, paragraph 3 of the Constitution of the United States; (3) was void because compliance therewith would not be that efficient and economical management and reasonable expenditure for the maintenance of way, structures and equipment required by subdivision (2) of Section 15a of the Act of Congress, known as the Act to Regulate Commerce, added thereto by one of the amendments of the Transportation Act of the 28th day of February, 1920; (4) that an overhead structure was more economical and less expensive; and that the underpass was a wasteful and uneconomical structure—the former estimated to cost $160,000.00—the latter $258,800.00, and it will be observed from the answers that in this latter cost is included the large cost of replacing and lowering sewer, water and gas mains, which expense is to be borne by the City of Durham. From the order of the Superior Court Judge of Durham County issuing the mandamus, the Railway Company appealed to the Supreme Court of the State, and from the judgment of that Court, affirming the order of the Superior Court, the Railway Companies have brought the case to this Court by a writ of error.

It is apparent from the above Statement of Facts, that the governing authorities of the City of Durham before acting gave the matter careful, full and painstaking consideration and endeavored to reach an intelligent conclusion.

ARGUMENT

The Railway Companies, Appellants, make in the record and brief of their counsel nine assignments of error to the judgment of the Supreme Court, of North Carolina but group these under three heads, to-wit:

1. The ordinance is arbitrary and not due process of law required by the Fourteenth Amendment of the Constitution of the United States.

2. The ordinance is void as in violation of the Commerce clause of the Constitution of the United States, Article 1, Section 8, paragraph 3.

3. The ordinance is void for that Compliance would not be efficient and economical management and reasonable expenditure for structures by the carriers as required by sub-division 2. Sec. 15a of the Interstate Commerce Act as amended by the Transportation Act.

1. The question whether the pleadings raised issues of fact to be tried by a jury was a question of local law and the construction of the statutes of the State by the Supreme Court of the State, is binding and conclusive, and is not reviewable by the Supreme Court of the United States.

Under the first group of errors assigned by the Railroad Companies in their brief, they assert error (p. 9) as follows: "A motion was made by the Railways and denied by the trial Court, to transfer the case to the civil docket for trial by jury. The Supreme Court of North Carolina affirmed the denial of this motion, holding that no issue of fact was tendered by the answers because they (Railways) qualified their admission of truth of the averments in paragraph 4 as to the volume of the traffic over this grade crossing,' thus disregarding the three federal issues tendered by the answers." What did the Supreme Court of North Carolina say upon this contention? At p. 243, 185 N. C. Rep., the Court said after quoting the statute of the State and commenting on it: "The contention of the defendants is that the answers raised issues of fact because they qualified their admission of the truth of the averment in paragraph 4 as to the volume of traffic over this grade cross-

ing to the extent averred in paragraphs 4 and 8 of the complaint; but neither of these denials raised an issue of fact. Neither did the assertion in the answer that the underpass would be more expensive than a bridge, and therefore, that the action of the governing authorities of the City of Durham was arbitrary, unreasonable and oppressive. These defenses raised no issues of fact to be tried by jury, *and the latter* was a *question* of fact for the Court." The Court then followed this by the citation of authorities and a statement of what were *issues of fact* within the meaning of the statute, and what were mere evidentiary matters not constituting issues of fact. The Court said further: "The City made out a prima facie case when it showed the enactment and passage of the ordinance, which was admitted by the three railroads. The judge properly held that a presumption existed in favor of the validity of the ordinance, and the burden was upon the railroads to show otherwise, which they declined to do. The Judge was ready to hear and determine the action, but the railroads failed to offer testimony or evidence of any kind whatever. It did not devolve upon the City to prove that the crossing was blocked on the dates mentioned to the exact extent as alleged in the complaint, as the burden of proving the ordinance invalid or unreasonable was on the defendants either by showing that in fact the railroads did not block the crossing; that traffic was not impeded, and that the crossing was not dangerous. That the governing body exceeded its powers, or committed fraud and oppression, constituting a manifest abuse of discretion are questions of law for the Court. The burden is upon the defendants to show affirmatively that there was an abuse of discretion, and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the Court. Crotts vs. Winston-Salem; 170 N. C., 27; Small vs. Edenton; 146 N. C. 527; Tate vs. Greensboro, 114 N. C. 399. There must be sufficient facts alleged to

show that the ordinance is unreasonable and oppressive before it can become an issue of fact for the jury." Further at p. 245, 185 N. C., the Court said: "The findings of Fact by the city in the exercise of its legislative and police power make out a *prima facie* case, and the railroads failed to offer any testimony or evidence to show abuse of discretion or unreasonableness."

We have quoted at this length from the opinion of the Supreme Court of the State of North Carolina to answer the criticism upon it by counsel of the Railway Companies in their brief and to show that the criticism is undeserved. There was a tribunal ready to hear, but the Railway Companies rested their case upon the theory that they were entitled to have a jury pass upon the issues of fact, and when the Court ruled against them on this motion, they declined to offer any evidence to the Judge of the Court, who alone was authorized to pass upon any controverted question of fact and declare the law. The railway companies were given the opportunity by proof and argument to controvert the claim asserted against them before a tribunal that was bound to listen, ready to listen, and bound to give legal effect to what had been established. They chose to rely upon argument without proof.

It cannot be a denial of "due process of law" that under the construction of the statutory law of the State the questions are determinable by the Court without the intervention of a jury rather than by the jury.

The proper construction to be given to a State statute in itself involves no Federal question, but it is exclusively for the State courts to determine, even though the State court may have misconstrued the same.

Phoenix Insurance Company vs. Gardiner, 11 Wall. 204; 20 L. Ed. 112; Morley vs. Lake Shore & Michigan Southern R. Co., 146 U. S., 162; 36 L. Ed. 925; Lindsley vs. National Carbonic Gas Co., 220 U. S. 73; 55 L. Ed. 375; Jacobson vs.

Massachusetts, 197 U. S. 24; 49 L. Ed. 649; Olsen vs. Smith, 195, 195 U. S., 333; 49 L. Ed. 224; Palmer vs. Texas, 212 U. S. 118, 53 L. Ed. 435; Bartlett vs. Lockwood, 160 U. S., 357; 40 L. Ed. 455

2. The denial of a jury trial is not necessarily a denial of due process of law.

The plaintiffs in error contend that "a constitutional hearing was denied them because their motion for a trial by jury was denied." If this contention is not disposed of by the authorities already cited, then this court has held that a jury trial is not in all cases essential to due process of law.

Montana vs. St. Louis Min. & Mill Co., 152 U. S., 160; 38 L. Ed. 398; Marvin vs. Trout, 199 U. S. 212; 50 L. Ed. 157; Maxwell vs. Daw, 176 U. S. 581; 44 L. Ed. 597; Walker vs. Louvinet, 93 U. S. 90; 23 L. Ed. 678.

The case of Missouri Pacific Ry. Co. vs. Nebraska, 217 U. S., 196, 54 L. Ed. 727, cited in the brief of the plaintiffs in error is distinguishable from the instant case. As head-noted the Court held "the compulsory construction and maintenance by a railway company, under Neb. Sess. Laws 1905, Chap. 105, Sections 1, 6 at its own expense, and without a preliminary hearing, under penalty of a heavy fine for refusal, of the side tracks or switches necessary to reach grain elevators which may be erected adjacent to the right of way cannot be justified as an exercise of the police power, but such statute takes the property of the railroad company without due process of law, even if construed as operating only when demand for such facilities is reasonable." In commenting on the statute attached in that case, the Court said: "This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs, and, possibly with-

out regard to place. It is true that in the first of the present cases the Supreme Court of Nebraska discussed the circumstances, and expressed the opinion that the demand was reasonable, and that building the side track would cast no undue burden upon the road; and, in the second, it somewhat has definitely indicated a similar opinion. So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed, as, by implication, confining their requirements to reasonable demands. On the face of it the statute seems to require the railroad to pay for side tracks whether reasonable or not,—or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly, no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power. But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the State Court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason, and moreover even on this strained construction, they refrain from paying at the peril of a fine, if they turn out wrong in their guess that in the particular case the Court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act." It is apparent by comparing the facts in that case with the facts in the instant case, that the decision of this Court in the case from which we have quoted does not support the contentions of the Railway Companies, plaintiff in error in the instant case.

The case of Erie Railroad Co. vs. Public Utility Comrs., 254 U. S., 394, illustrates the distinction between the instant case and Pacific R. R. Co. vs. Nebraska, and confirms the

power exercised by the City of Durham and we think conclusive of all the questions presented by this appeal. In that case the Court said, quoting from Chicago M. & St. P. R. Co., vs. Minneapolis, 232 U. S., 430; 58 L. Ed., 671: "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out over their tracks or to carry their tracks over such highways." Missouri P. Ry. Co. vs. Omaha, 235 U. S. 121; 59 L. Ed. 157; Northern P. R. Co. vs. Puget Sound & W. H. R. Co., 250 U. S. 332; 60 L. Ed. 1013.

Further, this Court said in that case: "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them additional claim to consideration. They are always the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and it necessarily frequents, the State, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be more dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares, must be taken to be the subject of implied limitation that it may be cut down whenever and so far as the safety of the public requires."

In the New Jersey case this Court held the power exercised obviously within the police power, in the Nebraska case clearly

beyond its limits. In the New Jersey case the power to determine the facts was delegated to a commission; in the instant case to the governing authorities of the City. It was not unconstitutional for the Legislature to delegate such powers to either a commission or board or the governing authorities of a town.

3. The ordinance is a reasonable exercise of the police power in the interest of the safety of the public.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish grade crossings, but also to build and maintain suitable bridges and viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

Chicago M. & St. P. R. Co. vs. Minneapolis, 232 U. S. 430, 58 L. Ed. 671, and cases cited. Erie Railroad Co. vs. Board of Public Utility Commrs., 254 U. S. 394, 65 L. Ed. 322; Atlantic Coast Line R. Co. vs. Goldsboro, 232 U. S. 548, 58 L. Ed. 721.

In their brief, plaintiffs in error, says (p. 9) in support of their contention that the ordinance of the City of Durham was arbitrary. "The railways did not assert from the Federal view-point (leaving out of consideration for the moment the contention that the Transportation Act had prescribed the rule to be followed in making such expenditures) that the council of the City of Durham lacked power to pass an ordinance *reasonably* calculated to promote public safety by requiring the separation of grades at a dangerous crossing: Erie Railroad Company vs. Public Utility Commissioners, 254 U. S. 394. Nor are we urging under this head that mere expense is the limit of the public power. The point that we do make under this first head is that, taking the answers as true, the underpass required by the ordinance is *unreasonable* and not that

due process of law imposed upon every exercise of State authority by the Fourteenth Amendment of the Federal Constitution."

Both the State Supreme Court and this Court have given the answer to this argument. The State Court in declaring "The findings of fact by the City in the exercise of its legislative and police powers make out a *prima facie* case and the railroads failed to offer any testimony or evidence to show abuse of discretion or unreasonableness," and further that the Courts will not interfere with the statutory discretionary powers given to the governing authorities of the incorporated towns unless their action is so unreasonable as to amount to an oppressive and manifest abuse of the exercise of this discretion.

Durham vs. R. R., 185 N. C. at p. 245; Lee vs. Waynesville, 184 N. C., 565; Newton vs. School Committee, 158 N. C. 186; Jeffress vs. Greenville, 154 N. C., 490; Rosenthal vs. Goldsboro, 149 N. C. 128; Ward vs. Commrs., 146 N. C. 534; Small vs. Edenton 146 N. C. 527; Tate vs. Greensboro, 114 N. C. 392; Broadnax vs. Groom 64 N. C. 244; Durham vs. Register 141 N. C., 128; Crotts vs. Winston-Salem, 170 N. C. 24; Dula vs. School Trustees 177 N. C. 426; Parks vs. Commrs. 186 N. C. 490, 498.

And this Court in declaring in Erie Railroad Co. vs. Board of Public Utility Commrs. supra, said: "If we could see that the evidence plainly did not warrant a finding that the particular crossing was dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone we well might hesitate. But the situation is one that always is dangerous. The board must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses. The Courts of the State have confirmed its judgment. The tri-

bunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion, their judgment must stand. We cannot say they were not. At some crossings the danger was less than at others, but it was necessary, or at least prudent to proceed on a general plan. Upon the whole matter, while it is difficult to avoid the apprehension that the State officials hardly gave any weight to the situation of the company as a whole, in their anxiety for the well-being of the State, we are of the opinion that they did not exceed their constutional powers."

New York & N. E. R. Co. vs. Bristol, 151 U. S. 556, 38 L. Ed. 269; Washington Ex rel. Oregon R. & N. Co. vs. Fairchild, 224 U. S. 510, 56 L. Ed. 863; St. Paul M. & M. R. Co. vs. Minnesota, 214 U. S. 497, 53 L. Ed. 1060.

The railways, appellants, contend that the ordinance is unreasonable and arbitrary because the underpass required by it to be constructed is more costly by $160,000.00 than the overhead bridge suggested by them; that the latter will eliminate some drainage difficulties and will better enable the railways to use to the maximum their properties. The conclusive answer, we think, to these suggestions is that the railway companies had the opportunity to present testimony to the Court and upon any and all of these matters. The City of Durham did not contend nor did the Courts rule that the findings by the City authorities were conclusive. But the railway companies declined to present any evidence to the Court. They offered no testimony, oral or documentary, to remove or repel the prima facie effect of the findings of fact by the City authorities in the ordinance. The ruling of the Supreme Court that the findings of fact by the City authorities were prima facie correct, did not prevent the railway companies from offering evidence contra, nor did it prevent a full judicial

review of such findings, but obviously, we think, this could be done only upon some testimony or evidence offered by the railway companies.

In Wabash R. Co. vs. Defiance, 167 U. S. 88, 42 L. Ed. 87, the Court said: "While the modern policy of railway engineering usually tends to the abolition of grade crossings, there is no hard and fast rule upon the subject, and it may well be that the exigencies of a certain street or locality may demand that travel shall descend to the level of the railway rather than ascend to bridges built over the track, but, however, this may be, we are not at liberty to inquire whether the discretion vested in common counsel in determining this question was unwisely exercised; or what the motives were for making the change; or whether the crossing was an improvement or burdensome to the railroad company, or made unsafe the persons crossing the track. There were considerations which might be properly urged upon the common council as argument against the proposed change, but it is beyond the province of the Court either to praise the wisdom or criticize the unwisdom of such action. The question before us is simply whether the Council had the power to make the change, and of this we have no doubt."

In Fields vs. Barber Asphalt Paving Company, 194 U. S. 618, 48 L. Ed. 1142, the Court said: "As we have said, there may be cases of fraud or arbitrary abuse of power when the courts will intervene. Under other circumstances the municiality and property owners interested are bound by the acts of their agents, the authorities amply sustain this view."

The Supreme Court of the State having held that the city municipal authorities of the City of Durham, were vested with the power to require the elimination of the grade crossing and to determine at whose expense this should be done. This Court said in Missouri P. R. Co. vs. Omaha, 235 U. S. 121, 59 L. Ed. 157: "The broad authorities to require any railroad

Company to make such improvement in the interest of public safety, is conferred by the Legislature upon the city. The safety of the travelling public is the primary consideration and this is accomplished by the construction of the viaduct, which is used by many people who travel across the viaduct every day. The public, when being transported by the street railway company, was exposed to the dangers of a railroad crossing, which it was within the authority of the State to authorize the municipality to discontinue. Under competent legislation, the City has undertaken to do this. In placing the expense entirely upon the railroad company whose locomotives and trains are principally responsible for the resulting danger to the public, we do not find such abuse of the recognized authority of the State as has justified the Courts in some cases in enjoining the enforcement of State and municipal legislation."

In that case the Railroad Companies contend that a viaduct sufficient to carry the ordinary traffic of the street, could be constructed at a cost of about $30,000.00, whereas the viaduct ordered to be built would cost approximately $80,000.00.

In Powell vs. Railroad, 178 N. C. 245, the Supreme Court of North Carolina said: "The right of the city government, both under its police powers and the several statutes applicable to require railroads to construct bridges along streets running over the tracks, is fully established in this jurisdiciton and is recognized in well-considered cases elsewhere."

4. The ordinance, being valid does not violate the Commerce Clause of the United States Constitution, Article 1. Section 8, Paragraph 3.

In Erie R. R. Co. vs. Board of Public Utility Commrs., supra, 254 U. S., 394, 65 L. Ed., 322 this Court said, in speak-Board of Public Utility Commisisoners of New Jersey, in the ing of the elimination of grade crossings as ordered by the

City of Patterson: "That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitations that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagements in interstate commerce can take away this fundamental right of the sovereign of the soil."

In Denver & R. G. R. Co. vs. Denver, 250 U. S., 241, 63 L. Ed. 958, the Court said: "To engage in interstate commerce the railroad must get on the land; and to get on to it, must comply with the conditions imposed by the State for the safety of its citizens."

We cannot understand how the elimination of a grade crossing, either by overhead bridge or underpass for the street, can impede or burden in any way, interstate commerce or interstate traffic, or impair the usefulness of the railway companies for such traffic.

The plaintiffs in error recite in their brief the case of Kansas City Southern Railway Company vs. Kaw Valley Drainage District, 233 U. S., 75; 58 L. Ed. 857, but we think that the case is distinguishable from the instant case. In that case petitions for mandamus were filed by the Drainage District against two railways, to require compliance with an order of the Drainage District upon the railways requiring them to raise their bridges over the Kansas river to specified heights

and to remove the old bridges, which the railroads had refused to do, claiming that the order was an unreasonable restraint on interstate commerce.

That case having been brought to this Court on a writ of error to the Supreme Court of the State of Kansas to review the issuance of peremptory writs of mandamus requiring the removal of interstate railway bridges over a navigable stream, the Court said: "These judgments must be taken as they read upon their face. They are not conditional orders to raise the bridge if the defendants can obtain the consent of parties not before the Court, and of one authority, at least not subject to its control. They cannot be qualified by speculation as to what is likely to happen in fact. They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the states. . . . To destroy the bridges across which these railroad lines necessarily pass is at least as direct interference with such commerce as to prohibit the importation of cattle or oelomargarin, or the export of natural gas. (Quoting authorities.) Furthermore, in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other states, but merely that it would be helpful by raising them. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass."

5. Plantiffs in error insist that the ordinance is void for that compliance with the same would not be that efficient and economical management and a reasonable expenditure for structures by the carriers as required by sub-division 2, Section 15a, of the Interstate Commerce Act as amended by Section 422 of the Transportation Act, approved February 28, 1920.

This act of Congress provides: "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; provided that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the Country."

It will appear from this amendment made by the Transportation Act of February 28, 1920, that it deals with the powers of the Interstate Commerce Commission in its adjustment and fixing of rates, and in determining and fixing reasonable rates the Interstate Commerce Commission should consider such expenditures as were reasonable under honest, efficient and economical management of the railroad companies engaged in Interstate traffic.

The plaintiffs in error, in the instant case seem to recognize it to be their duty to abolish the grade crossing at Chapel Hill Street, in the City of Durham, but only by an overhead bridge and that to comply with the ordinance of the City, the additional expense would be $100,000.00.

This amendment to the Interstate Commerce act was approved on February 28, 1920. The case of Erie R. R. Co. vs. Board Public Utility Commissioners, 254 U. S., 394, was argued before this Court on the 16th and 17th of November, 1920, and decided January 3, 1921, nearly a year after the

enactment of the Transportation Act. That case involved the elimination of a grade crossing in the City of Patterson, that, according to the record, would impose a burden of $200,000.00 upon one railroad company, a party to the suit, and practically bankrupt the same. Eminent counsel filed briefs and argued the case before this Court. It was not contended in that case that compliance with the order of the Public Utility Commissioners of New Jersey should be first submitted to and approved by the Interstate Commerce Commission, and to have it find that the expenditure of $2,000,000.00 by one of the roads was a reasonable expenditure to be made in an honest, efficient and economical management of the same, nor was this amendment now insisted upon called to the attention of the Court by the learned counsel appearing in that case. It would be rash to assume that it was overlooked by them, nor did this court advert in the opinion to that amendment, nor can it be assumed that Congress intended by this amendment to deprive the States, or sub-division of States, from legislating in the exercise of their police power on subjects vitally relating to the health, life and safety of their citizens.

Sherlock vs. Alling, 93 U. S., 99; 23 L. Ed. 819; U. S. vs. E. C. Knight Co., 156 U. S., 1, 39 L. Ed. 325; Pittsburgh & F. Coal Co. vs. Louisanna 156 U. S. 590, 39 L. Ed., 545; Plumly vs. Mass. 155 U. S., 461, 39 L. Ed. 223.

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SOUTHERN RAILWAY COMPANY ET AL. *v.* CITY OF DURHAM, NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 71. Argued October 14, 1924.—Decided November 17, 1924.

1. The right of jury trial in a state court is determined by the local law, concerning which this Court accepts the decision of the highest state court. P. 179.
2. When a party in a state court, with full opportunity, offers no evidence to sustain defenses alleged under the Constitution, a judgment overruling the defenses does not deprive him of federal rights. *Id.*

185 N. C. 240, affirmed.

ERROR to a judgment of the Supreme Court of North Carolina sustaining a mandamus to enforce an ordinance of the City which required three railway companies to eliminate a grade crossing.

Mr. W. M. Hendren and *Mr. F. M. Rivinus*, with whom *Mr. W. B. Guthrie*, *Mr. Theodore W. Reath*, *Mr. James F. Wright* and *Mr. L. E. Jeffries* were on the briefs, for plaintiffs in error.

Mr. James S. Manning, with whom *Mr. John H. Manning* and *Mr. S. C. Chambers* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By ordinance the City Council of Durham declared a certain grade crossing dangerous and ordered plaintiffs

in error to eliminate it by constructing an underpass with proper approaches, etc. They failed to comply; the city instituted a mandamus proceeding to compel obedience.

The petition, after setting out the facts and circumstances, asked an appropriate decree. Answering, plaintiffs in error attacked the ordinance as arbitrary, unreasonable and subversive of rights guaranteed by the Fourteenth Amendment; also because it conflicted with the federal Act to Regulate Commerce by imposing undue expense upon them. The facts relied upon to support these claims were specified.

Having heard the cause upon complaint, answers and argument of counsel the trial court, "being of the opinion that no issue of fact for trial by jury is raised upon the pleadings," made findings of fact, declared the ordinance valid and directed compliance therewith. The railroads offered no evidence, but asked continuation of the cause until the next term and that no further proceedings should be taken until the issues of fact raised by the answers could be decided by a jury. This was denied and they appealed. The Supreme Court held refusal to continue the hearing and transfer the cause to the civil docket for trial by jury was not erroneous, and said that "the judge was ready to hear and determine the action but the railroads failed to offer testimony or evidence of any kind whatever."

We are unable to find that plaintiffs in error have been deprived of any federal right. They had full opportunity to present evidence to support their contentions in the trial court, but offered none. Neither federal laws nor Constitution gave them the right to demand trial by jury when the local statutes and practice prescribed otherwise. The ordinary rule applies, and we accept the ruling of the Supreme Court as to the local law. *First National Bank* v. *Weld County*, 264 U. S. 450, 454.

Affirmed.